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No. 06-1196

In the Supreme Court of the United States

KHALED A. F. AL ODAH, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the D.C. Circuit err in relying again on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to dismiss these petitions and to hold that petitioners have no common law right to habeas protected by the Suspension Clause and no constitutional rights whatsoever, despite this Court's ruling in *Rasul v. Bush*, 542 U.S. 466 (2004), that these petitioners are in a fundamentally different position from those in *Eisentrager*, that their access to the writ is consistent with the historical reach of the writ at common law, and that they are confined within the territorial jurisdiction of the United States?

2. Given that the Court in *Rasul* concluded that the writ at common law would have extended to persons detained at Guantanamo, did the D.C. Circuit err in holding that petitioners' right to the writ was not protected by the Suspension Clause because they supposedly would not have been entitled to the writ at common law?

3. Are petitioners, who have been detained without charge or trial for more than five years in the exclusive custody of the United States at Guantanamo, a territory under the plenary and exclusive jurisdiction of the United States, entitled to the protection of the Fifth Amendment right not to be deprived of liberty without due process of law and of the Geneva Conventions?

4. Should section 7(b) of the Military Commissions Act of 2006, which does not explicitly mention habeas corpus, be construed to eliminate the courts' jurisdiction over petitioners' pending habeas cases, thereby creating serious constitutional issues?

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

1. Petitioner in *Hicks (Rasul) v. Bush*, No. 02-CV-0299-CKK (D.D.C.), is David Hicks. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gordon R. England, Secretary of the Navy; John D. Altenburg, Jr., Appointing Authority for Military Commissions; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Brice A. Gyurisko, Commander, Joint Detention Operations Group.

2. Petitioners in *Al-Odah v. United States*, No. 02-CV-0828-CKK (D.D.C.), are Fawzi Khalid Abdullah Fahad Al Odah, Omar Rajab Amin, Nasser Nijer Naser Al Mutairi, Khalid Abdullah Mishal Al Mutairi, Abdullah Kamal Abdullah Kamal Al Kandari, Abdulaziz Sayer Owain Al Shammari, Abdullah Saleh Ali Al Ajmi, Mohammed Funaitel Al Dihani, Fayiz Mohammed Ahmed Al Kandari, Fwad Mahmoud Al Rabiah, Adil Zamil Abdull Mohssin Al Zamil, and Saad Madai Saad Hawash Al-Azmi, and their next friends Khaled A.F. Al Odah, Mohammad R. M. R. Ameen, Nayef N.N.B.J. Al Mutairi, Meshal A.A. Th Al Mutairi, Mansour K.A. Kamel, Sayer O.Z. Al Shammari, Mesfer Saleh Ali Al Ajmi, Mubarak F.S.M. Al Daihani, Mohammad A.J.M.H. Al Kandari, Monzer M.H.A. Al Rabieah, Walid Z.A. Al Zamel, and Hamad Madai Saad.

Respondents include the United States of America and the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Richard B. Myers, Chairman, Joint Chiefs of Staff; Gen. Rick Baccus, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Terry Carrico, Commander, Camp Delta, Camp X-Ray, Guantanamo Bay, Cuba.

3. Petitioners in *Habib v. Bush*, No. 02-CV-1130-CKK (D.D.C.), are Mamdouh Habib and his next friend Maha

LIST OF ALL PARTIES—continued

Habib. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Rick Baccus, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Lt. Col. William Cline, Commander, Camp Delta.

4. Petitioners in *Kurnaz v. Bush*, No. 04-CV-1135-ESH (D.D.C.), are Murat Kurnaz and his next friend Rabiye Kurnaz. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

5. Petitioners in *Begg v. Bush*, No. 04-CV-1137-RMC (D.D.C.), are Moazzam Begg and Feroz Ali Abbasi, and their next friends Sally Begg and Zumrati Zaitun Juma. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

6. Petitioners in *El-Banna v. Bush*, No. 04-CV-1144-RWR (D.D.C.), are Jamil El-Banna, Bisher Al-Rawi, and Martin Mubanga, and their next friends Sabah Sunnrqrout, Jahida Sayyadi, and Kathleen Mubanga. Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

7. Petitioners in *Gherebi v. Bush*, No. 04-CV-1164-RBW (D.D.C.), are Falen Gherebi (also known as Salim Gherebi) and his next friend Belaid Gherebi. Respondents include the following individuals or their successors in office: George

LIST OF ALL PARTIES—continued

W. Bush, President; Donald Rumsfeld, Secretary of Defense; and "1,000 Unknown Named United States Military Personnel and Government Officers and/or Officials."

8. Petitioners in *Anam v. Bush*, No. 04-CV-1194-HHK (D.D.C.), are Suhail Abdu Anam, Fahmi Abdullah Ubad Al-Tawlaqi (also known as Fahmi Abdullah Ahmed), Bisher-Naser Ali Almarwalh (also known as BashirNaser Ali Almarwalh and Bashir Nasir Ali Al-Marwala), Musaab Omar Al-Madhwani (also known as Musa'ab Omar Madhwani), Abdulkhaliq Al-Baidhani (also known as Abdul Khaleq Ahmed Al-Baidandi), Ali Ahmed Mohammed Al Razehi, Saeed Ahmed Al-Sarim, Imad Abdullah Hassan, Jalal Salim Bin Amer, Ali Yahya Mahdi (also known as Ali Yahaya Mahdi Al-Rimi), Atag Ali Abdoh (also known as Atag Ali Abdoh Al Hag), Khalid Ahmed Kassim, Fahmi Abdullah Ahmed Abdualaziz Abdoh Al Swidi (also known as Abdualaziz Abdoh Alsswidi), and Ali Hussin Al-Tis, and their next friends Mohamed Abdu Anam, Huissen Naser Ali Almarwalh, Ali Omar Madhwani, Khalid Al-Baidhani, Abdullah Ahmed Mohammed Al Razehi, Samir Ahmed Al-Sarim, Amro Abdullah Hassan, Faez Bin Amer, Mohamed Yahya Mahdi, Atag Ali Abdoh Al Hag, Fadhle Ahmed Kassim, Abdullah Ahmed Ubad Al-Tawlaqi, Kmal Abdullah Ahmed, Adnan Abdoh Alswidi, and Hadi Hussin Al-Tis.

Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

9. Petitioners in *Almurbati v. Bush*, No. 04-CV-1227-RBW (D.D.C.), are Isa Ali Abdulla Almurbati, Adel Kamel Abdulla Hajee, Salah Abdul Rasool Al Bloushi, Abdullah Majed Sayyah Hasan Alnoaimi, Salman Bin Ibrahim Bin Mohammed Bin Ali Al-Kalifa, and Jum'ah Mohammed Ab-

LIST OF ALL PARTIES—continued

dullatif Aldossari, and their next friends Mohamed Ali Abdulla Almurbati, Abdullah Kamel Abdulla Hajee, Abdul Rasool Ali Al Bloushi, Majed Sayah Alnoaimi, Ibrahim Bin Mohammed Bin Ali Al-Khalifa, and Khalid Mohammed Abdullatif Aldossari.

Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

10. Petitioners in *Abdah v. Bush*, No. 04-CV-1254-HHK (D.D.C.), are Mahmoad Abdah, Majid Mahmoud Ahmed (also known as Majed Mohmood, and Majid M. Abdu Ahmed), Abdulmalik Abdulwahhab Al-Rahabi, Makhtar Yahia Naji Al-Wrafie, Aref Abd II Rheem, Yasein Khasem Mohammad Esmail, Adnan Farhan Abdul Latif, Jamal Mar'i, Othman Abdulraheem Mohammad, Adil Saeed El Haj Obaid, Mohamed Mohamed Hassan Odaini, Sadeq Mohammed Said, Farouk Ali Ahmed Saif, and Salman Yahaldi Hsan Mohammed Saud, and their next friends Mahmoad Abdah Ahmed, Mahmoud Ahmed, Ahmed Abdulwahhab, Foade Yahla Naji Al-Wrafie, Aref Abd Al Rahjm, Jamel Khasem Mohammad, Mohamed Farhan Abdul Latif, Nabil Mokamed Mar'I, Araf Abdulraheem Mohammad, Nazem Saeed El Haj Obaid, Bashir Mohamed Hassan Odaini, Abd Alsalam Mohammed Saeed, Sheab Al Mohamedi, and Yahiva Hsane Mohammed Saud Al-Rewaye.

Respondents include the following individuals or their successors in office: George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Major Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

APPLICABLE PROVISIONS 1

STATEMENT OF THE CASE 2

A. The Guantanamo Detainees 2

B. Summary of Proceedings Below 6

C. The DTA and the MCA 9

D. Court of Appeals Opinion 10

REASONS FOR GRANTING THE PETITION 12

1. The Decision Ignores *Rasul* 14

2. The Decision Misconceives and Misapplies The Suspension Clause 15

3. The Decision Impermissibly Denies Petitioners the Fundamental Protections of the Constitution 19

4. The MCA Does Not Clearly and Explicitly Revoke Habeas Jurisdiction Over These Pending Cases 25

5. Most Of Petitioners' Treaty-Based Habeas Claims Were Improperly Dismissed 26

CONCLUSION 28

APPENDICES

A. Court of Appeals Opinion ..... App. 1

B. Court of Appeals Order Granting Petition for Interlocutory Appeal ..... App. 55

C. District Court Order Certifying Opinion for Interlocutory Appeal ..... App. 58

TABLE OF CONTENTS—continued

Page

D. District Court Opinion ..... App. 61
E. Constitution of the United States ..... App. 129
F. Authorization for Use of Military Force ..... App. 130
G. Detainee Treatment Act of 2005 ..... App. 132
H. Military Commissions Act of 2006 ..... App. 139
I. Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, dated July 7, 2004 ..... App. 141
J. Memorandum of the Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, dated July 29, 2004 ..... App. 147
K. Deputy Secretary of Defense Order OSD 06942-04, dated May 11, 2004 ..... App. 189
L. Seton Hall University School of Law, *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data* (2006) ..... App. 204

TABLE OF AUTHORITIES

Page(s)

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Fisher v. Baker, 203 U.S. 174 (1906) 17
In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005) ..... *passim*
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Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 23, 27
Henderson v. INS, 157 F.3d 106 (2d Cir. 1998) 27
INS v. St. Cyr, 533 U.S. 289 (2001) ..... *passim*
Johnson v. Eisentrager, 339 U.S. 763 (1950) ..... *passim*
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Rasul v. Bush, 542 U.S. 466 (2004) ..... *passim*
Shaughnessy v. United States, 345 U.S. 206 (1953) 24
Swain v. Pressley, 430 U.S. 372 (1977) 12
United States v. Flores, 289 U.S. 137 (1933) 22
United States v. Rogers, 50 U.S. 249 (1893) 22
United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 20
Ex parte Yerger, 75 U.S. 85 (1868) 25

TABLE OF AUTHORITIES—continued

Page(s)

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Article I, Section 9, clause 2 ..... 15, 16
Article I, Section 9, clause 4 16
Amendment V ..... *passim*

STATUTES

10 U.S.C. § 950j(b) 25, 26
10 U.S.C. § 801 note 10
28 U.S.C. § 1254(1) 1
28 U.S.C. § 2241 10
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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (Appendix ("App.") D, 61-128) is reported at 355 F. Supp. 2d 443 (D.D.C. 2005). The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. A, 1-54) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS

United States Constitution, art. I, § 9, cl. 2 and amend. V; Authorization for Use of Military Force ("AUMF"), 115 Stat. 224 (2001); Military Commissions Act of 2006 ("MCA") §§ 3(a) (adding 10 U.S.C. § 950j(b)), 7, Pub. L. No. 109-366, 120 Stat. 2600; Detainee Treatment Act of 2005 ("DTA") § 1005, Pub. L. No. 109-148, 119 Stat. 2740, 10 U.S.C. § 801 note; Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, dated July 7, 2004; Memorandum of the Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, dated July 29, 2004; Deputy Secretary of Defense Order OSD 06942-04, dated May 11, 2004. These provisions are reprinted at App. E-L, 129-203.

STATEMENT OF THE CASE

Petitioners are 39 prisoners held by the United States at the U.S. Naval Base at Guantanamo Bay.[1] Most have been in U.S. custody for more than five years. None is a citizen of a nation at war with the United States.[2] All maintain that they have never engaged in combat against the United States and are wholly innocent of wrongdoing. They seek a single remedy: a fair and impartial hearing before a neutral decision maker to determine whether there is a reasonable basis in law and fact for detaining them. They have never received such a hearing, although this Court ruled almost three years ago that they were entitled to one. *See Rasul v. Bush*, 542 U.S. 466 (2004).

A. The Guantanamo Detainees

Nearly 400 prisoners remain at Guantanamo. Only 15 have been designated as persons the government "has reason to believe" supported terrorism, and, after more than five years, only ten have ever been charged.[3] None has been tried. If those charged are ever convicted, they may be sentenced to terms in prison. Meanwhile, the other approximately 380 detainees have already served terms as long as five years without charge, without trial, and without any fair hearing – and with no end in sight. And Department of De-

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[1] Petitioners also include next friends of the prisoners who filed petitions on their behalf as well as prisoners who have been repatriated but whose cases were not dismissed as a result by the district court. Thirteen of the petitioners were before this Court in *Rasul v. Bush*, 542 U.S. 466 (2004).

[2] Petitioners in these cases are citizens of Afghanistan, Australia, Bahrain, Jordan, Iraq, Kuwait, Libya, Turkey, and Yemen.

[3] *See* Department of Defense News Release, *President Determines Enemy Combatants Subject to His Military Order*, July 3, 2003, http://www.defenselink.mil/releases/2003/nr20030703-0173.html; Department of Defense News Release, *Presidential Military Order Applied to Nine more Combatants*, July 7, 2004, http://www.defenselink.mil/releases/2004/nr20040707-0987.html.

fense Officials have indicated that those charged may continue to be detained even if they are acquitted.[4]

Who are these prisoners? According to Defense Department documents, only 5% were captured by U.S. forces; 86% were taken into custody by Pakistani or Northern Alliance forces at a time when the United States was offering large financial bounties for the capture of any suspected Arab terrorist; the large majority never participated in any combat against the United States on a battlefield; only 8% have been classified as al Qaeda fighters.[5]

Some of the prisoners, including a number of the petitioners in these cases, were picked up thousands of miles from the conflict in Afghanistan. Most, however, were rounded up in Afghanistan and the areas of Pakistan bordering on Afghanistan in the months immediately following 9/11. At that time, Afghanistan was suffering "the worst humanitarian crisis in the world" after enduring twenty-three years of civil war and three consecutive years of severe drought.[6] Charitable organizations and individual volunteers, mostly from the Middle East, had flocked to the area to provide humanitarian aid.[7] Following the September 11

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[4] *See* Department of Defense News Briefing, Presentation by Secretary of Defense Donald Rumsfeld, March 28, 2002, http://www.defenselink.mil/transcripts/2002/t03282002_t0328sd.html.

[5] Mark Denbeaux *et al.*, Seton Hall University School of Law, *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data* 2-4 (2006) ("Seton Hall Report"), App. 221-23.

[6] *United Nations Development Program/United Nations Office for the Coordination of Humanitarian Affairs*, Assistance for Afghanistan Weekly Update, Issue No. 429, September 12, 2001, *available at* http://www.reliefweb.int/rw/rwb.nsf/db900SID/OCHA-64DHQ4.

[7] RAND National Defense Research Institute, *Aid During Conflict: Interaction Between Military and Civil Assistance Providers in Afghanistan, September 2001-June 2002* 26-37, Prepared for the Office of the Secretary of Defense and the United States Agency for International De-

attacks, they were at great risk. The U.S. government offered substantial financial bounties for "any Arab terrorist" turned in to U.S. forces.[8] In response, numerous Arabs in the area were swept up and turned over by Pakistani and Northern Alliance forces.[9]

The U.S. military has well-established procedures for culling out people detained by mistake. Army Regulation 190-8 requires hearings to be held promptly in the field close to the time and place of capture if there is any doubt about a captive's status.[10] That regulation and its predecessors had been followed in every previous conflict since Vietnam. During the Gulf War, for example, the military held 1,196 of these hearings and, in 886 of those cases – almost 75% of the time – the detainees were found not to be combatants,

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velopment (2004), http://www.rand.org/pubs/monographs/2004/RAND_MG212.sum.pdf.

[8] Leaflet distributed by U.S. Forces in Afghanistan, Seton Hall Report, App. 236.

[9] Seton Hall Report, App. 205-06, 221-24. The bounties offered ranged from $5,000 to $25,000. These sums were paid to residents of countries where the average annual income per capita is less than $200. *See* The World Bank Group, Press Release, *World Bank Increases Support For Public Administration* (Jan. 27, 2005), *available at* http://www.reliefweb.int/rw/RWB.NSF/db900SID/KHII-6932QV. The leaflets correctly proclaimed that the bounties offered were sufficient "to take care of [a] family . . . for the rest of your life." App. 236. Any Arab in the area was therefore an extremely valuable commodity.

[10] *Enemy Prisoners of War; Retained Personnel, Civilian Internees and Other Detainees,* U.S. Army Regulation 190-8, applicable to the Departments of the Army, the Navy, the Air Force, and the Marine Corps, Washington, D.C. (1 Oct. 1997), Chapter 1-5, para. a ("All persons taken into custody by U.S. forces will be provided with the protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War ("GPW") until some legal status is determined by a competent authority."); *id.* at 1-6 para. b ("a competent tribunal shall determine the status of any person . . . concerning whom any doubt . . . exists").

but innocent civilians, and released.[11] Inexplicably, the government did not provide the hearings required by that regulation before shipping captives to Guantanamo.[12]

It is now clear that the government selected Guantanamo as its prison site specifically to avoid judicial review of the legality of its actions. It sought a location beyond the reach of both U.S. and foreign courts. As John Yoo, the Deputy Assistant Attorney General at the time, has recounted: "[N]o location was perfect," but Guantanamo "seemed to fit the bill."[13]

Uncertainty about the true nature of the prisoners at Guantanamo – a concern that, in many instances, the U.S. simply got the wrong guy – has pervaded the highest echelons of the military at Guantanamo. On October 6, 2004, Brigadier General Martin Lucenti, Jr., the deputy commander at Guantanamo, said: "I would say most of [the prisoners], the majority of them, will either be released or transferred to their own countries . . . Most of these guys weren't fighting. They were running."[14] In January 2005 Major General Jay Hood, commander at Guantanamo, ac-

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[11] *See Report on the Conduct of the Persian Gulf War*, Final Report to Congress by the Department of Defense (April 1992), *cited in* David Cole, *Enemy Aliens*, 42 n.69 (2003).

[12] Reportedly, military officials intended to hold these hearings, as they had in previous conflicts, but civilian officials in Washington stopped them. *See* Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, THE NEW YORKER, July 3, 2006.

[13] John Yoo, *War By Other Means: An Insider's Account of the War on Terror* 142-43 (2006). *See also* Patrick F. Philbin and John C. Yoo, Memorandum for William J. Haynes, II, General Counsel, Department of Defense, Re: Possible Habeas Jurisdiction over Aliens Held at Guantanamo Bay, Cuba, Dec. 28, 2001, *reprinted in* Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* 29 (2005); Col. Daniel F. McCallum, *Why GTMO?* (2003), http://www.ndu.edu/library/n4/n035603g.pdf.

[14] John Mintz, *Most at Guantanamo to be Freed or Sent Home, Officer Says*, THE WASHINGTON POST, Oct. 6, 2004, at A16.

knowledged that: "Sometimes we just didn't get the right folks," and that the reason those "folks" were still in Guantanamo was that "[n]obody wants to be the one to sign the release papers . . . . There's no muscle in the system."[15] We now know that, in August 2002 – more than four and a half years ago – the CIA sent a confidential report to Washington reporting that most of the Guantanamo detainees "didn't belong there."[16]

B. Summary of Proceedings Below

The history of this litigation was outlined by Judge Green in her opinion below. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 448-52 (D.D.C. 2005). The first case was filed more than five years ago, on February 19, 2002, *Rasul v. Bush*, D.D.C., No. 02-CV-0299 (CKK), styled as a petition for the writ of habeas corpus. *Rasul* was soon followed by *Al Odah v. United States*, D.D.C., No. 02-CV-0828, styled as a complaint, but asserting a cause of action for violation of the habeas statute and seeking, most importantly, an impartial hearing to determine if there was a reasonable basis for the detentions.[17]

The government never filed a return or answer in *Rasul* or *Al Odah*. Instead, it moved to dismiss both for lack of jurisdiction. The district court granted the motion, and the D.C. Circuit affirmed. Relying principally on this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the D.C. Circuit held that, because Guantanamo is outside the technical sovereignty of the United States, petitioners had no rights under the Constitution and therefore no access to the

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[15] Christopher Cooper, *Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape*, WALL ST. J., Jan. 26, 2005, at A1.

[16] That report was brought to the attention of White House officials and ignored. *See* Mayer, *supra*.

[17] Formal applications for the writ of habeas corpus were filed in *Al Odah* on July 27, 2004.

U.S. courts through the writ of habeas corpus or otherwise. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

In *Rasul,* this Court reversed. It found that the Guantanamo petitioners differ from the *Eisentrager* detainees in "important respects." 542 U.S. at 476. Most significantly, the Court emphasized that, unlike the convicted prisoners in *Eisentrager* who were incarcerated in Germany, the Guantanamo petitioners are imprisoned "within 'the territorial jurisdiction' of the United States" in an area "over which the United States exercises exclusive jurisdiction and control." *Id.* at 476, 480. The Court held that aliens at Guantanamo, "no less than American citizens," have the right to challenge the legality of their detention in the U.S. courts through the writ of habeas corpus. *Id.* at 481. Notably, in addition to holding that the petitioners were entitled to the writ under the federal habeas statute, the Court concluded that application of the writ to them was "consistent with the historical reach of the writ of habeas corpus" at common law. *Id.* It observed that "[h]abeas corpus is . . . 'a writ antecedent to statute,'" and at common law the writ extended to persons detained not only "within sovereign territory of the realm," but in "all other dominions under the sovereign's control." *Rasul*, 542 U.S. at 473, 481-82. The Court also noted that the Guantanamo petitioners' claims "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" *Id.* at 484 n.15. The Court remanded to the district court with instructions "to consider in the first instance the merits of petitioners' claims." *Id.* at 485.

Despite that ruling, almost three years later, not a single habeas hearing has been held.

Nine days after this Court's decision, the Deputy Secretary of Defense suddenly announced, as a matter of internal department "management," a new, so-called Combatant

Status Review Tribunal ("CSRT") process at Guantanamo.[18] That process did not even purport to provide *de novo* determinations of whether the detainees were properly detained. Rather, according to the announcement, it provided a process to review the determinations that had already been made "through multiple levels of review by officers of the Department of Defense" that the detainees were "enemy combatants." The detainees were not allowed counsel. They were not allowed to see or rebut the key accusations against them, which the government considered classified, and they were given no meaningful opportunity to present exculpatory evidence. In short, the detainees had the burden of proving themselves innocent of charges that, for the most part, they were not entitled to see, let alone examine or rebut. Predictably, in over 90% of the cases, the tribunals confirmed the decisions previously made by higher ups that the detainees were properly detained as enemy combatants.[19]

On October 4, 2004, while it was conducting these internal CSRT proceedings at Guantanamo, the government moved in court to dismiss these cases as a matter of law. It argued again that, because petitioners are being detained outside sovereign U.S. territory, they have no constitutional rights and therefore no right to obtain relief.

Judge Richard Leon agreed with respondents and granted their motion to dismiss in two of the cases that were then pending. *Khalid v. Bush,* 355 F. Supp. 2d 311 (D.D.C. 2005). The judges in the other 11 pending cases transferred those cases for decision to Judge Joyce Hens Green, who

[18] Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, dated July 7, 2004, App. I, 141-46.

[19] Mark Denbeaux *et al.*, Seton Hall University School of Law, *No Hearing Hearings: An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantánamo* 39 (2006), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

denied the government's motion in large part. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005).

Judge Green rejected the government's contention that it had effectively deprived the petitioners of constitutional rights by placing them in Guantanamo, an area outside technical U.S. sovereignty. Judge Green held that "the right not to be deprived of liberty without due process of law – is one of the most fundamental rights recognized by the U.S. Constitution," and that, in light of the decision in *Rasul*, "it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply." *Id.* at 464. Judge Green also rejected the government's alternative argument that the CSRT proceedings afforded petitioners the equivalent of constitutional due process. *Id.* at 465-78. She found that the CSRT procedures "deprive[d] the detainees of sufficient notice of the factual bases for their detention and den[ied] them a fair opportunity to challenge their incarceration," and also improperly allowed for reliance on statements obtained through torture and coercion. *Id.* at 468, 472. Finally, Judge Green sustained the Geneva Conventions claims of those detainees who the government claimed were connected to the Taliban but dismissed the Geneva Conventions claims of those detainees who the government claimed were connected to al Qaeda. *Id.* at 478-81.

On February 3, 2005, Judge Green certified respondents' request for interlocutory appeal and granted their motion for a stay of proceedings pending the outcome of the appeal. Petitioners cross-appealed. The D.C. Circuit consolidated those appeals with petitioners' appeal from Judge Leon's decision.

C. The DTA and the MCA

On December 30, 2005, after the cases had been briefed and argued before the D.C. Circuit, the President signed the

Detainee Treatment Act of 2005 (the "DTA") into law.[20] Section 1005(e) of the DTA purported to strip the courts of jurisdiction over habeas petitions filed by Guantanamo detainees.[21] This Court held in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764-69 (2006), that the DTA did not deprive the courts of jurisdiction over habeas cases pending in court when the legislation was enacted.

On October 17, 2006, the President signed the Military Commissions Act of 2006 (the "MCA").[22] Section 7(a) of the MCA struck the amendment to 28 U.S.C. § 2241 made by the DTA and added a new paragraph (e) stripping the courts of jurisdiction over two categories of cases: (1) "application[s] for a writ of habeas corpus" and (2) "other action[s]" that relate "to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of aliens determined by the United States to have been properly detained as enemy combatants. Section 7(b) provides that the amendments made by section 7(a) shall take effect upon enactment of the MCA and shall apply "to all cases, without exception, pending on or after the date of enactment . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention."

D. Court of Appeals Opinion

The D.C. Circuit held that the MCA eliminated the courts' jurisdiction over petitioners' pending habeas cases. App. 6-10.[23] The majority (Randolph & Sentelle, JJ.,

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[20] The DTA was enacted twice in identical form, first on December 30, 2005, as part of the Defense Appropriations Act, 2006, Pub. L. No. 109-148, 119 Stat. 2739, and second on January 6, 2006, as part of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3474. *See* 10 U.S.C. § 801 note.

[21] App. G, 132-38.

[22] App. H, 139-40.

[23] The D.C. Circuit opinions, majority and dissent, are reproduced as Appendix A, App. 1-54.

Rogers, J. dissenting) also held that the elimination of habeas did not violate the Suspension Clause of the U.S. Constitution, relying on *Eisentrager* as the "controlling" decision. App. 14-22.

First, citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001), the majority asserted that the Suspension Clause "protects the writ 'as it existed in 1789.'" App. 10-11. The majority said that its own research and analysis of the cases confirmed that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." App. 11-14. It said that *Eisentrager* "ends any doubt about the scope of common law habeas." App. 14. The majority acknowledged that this Court in *Rasul* had examined the "'historical reach of the writ'" but relied instead on Justice Scalia's contrary analysis in his dissenting opinion. App. 14-15.

Second, the majority held that, in any event, petitioners could not claim the protections of the Suspension Clause because, under *Eisentrager*, "the Constitution does not confer rights on aliens without property or presence within the United States." App. 15. The majority concluded that "[a]ny distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany . . . is immaterial to the application of the Suspension Clause." App. 17.

Judge Rogers dissented. She observed at the outset that the majority "fundamentally misconstrues" the nature of the Suspension Clause, which "is a limitation on the powers of Congress," and that "it is only by misreading the historical record and ignoring the Supreme Court's well-considered and binding dictum in *Rasul v. Bush*, 542 U.S. 466, 481-82 (2004), that the writ at common law would have extended to the detainees, that the court can conclude that neither this court nor the district courts have jurisdiction to consider the detainees' habeas claims." App. 23.

Judge Rogers noted that this Court has stated on several occasions that "*at the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.'" App. 32. She further pointed out that this Court already had determined in *Rasul* that application of the writ "'to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus." App. 36. Thus, in Judge Rogers' view, "[t]o the extent the court relies on *Eisentrager* as proof of its historical theory, the Supreme Court rejected that approach in *Rasul*." App. 40 n.8.

Judge Rogers analyzed whether Congress had provided an adequate substitute for habeas in the MCA (*see Swain v. Pressley*, 430 U.S. 372 (1977)), and concluded that it had not. App. 40-46. She found that the MCA's "alternatives are neither adequate to test whether detention is unlawful nor directed toward releasing those who are unlawfully held." [24] App. 41.

REASONS FOR GRANTING THE PETITION

Two years and eight months have passed since this Court held in *Rasul* that the courts have jurisdiction "to determine

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[24] Among the deficiencies Judge Rogers found in the underlying CSRT proceedings were: (i) the detainee bears the burden of proving why he should not be detained; (ii) the detainee need not be informed of the basis for his detention or be allowed to introduce rebuttal evidence; (iii) the detainee must proceed without the benefit of his own counsel; and (iv) the CSRT proceedings are before a military panel subject to command influence. App. 42-43. Judge Rogers found that "each of these practices impedes the process of determining the true facts underlying the lawfulness of the challenged detention," and therefore "are inimical to the nature of habeas review." App. 43. Judge Rogers also found that judicial review would not cure these deficiencies because: (i) the D.C. Circuit can review only the record developed by the CSRT and determine if the CSRT followed its own standards; (ii) the detainee cannot present rebuttal evidence to the court; and (iii) continued detention could be justified by the CSRT on the basis of evidence obtained through torture. App. 43-44. Beyond that, Judge Rogers pointed out that, unlike a habeas court, the reviewing court could not guarantee the remedy of discharge. App. 44.

the legality of the Executive's potentially indefinite detention" of petitioners at Guantanamo and ordered the district court "to consider in the first instance the merits of petitioners' claims." 542 U.S. at 485. Yet, to date, the district court has not considered the merits of *any* of petitioners' habeas claims.

While at the time of *Rasul* there was a statutory basis for habeas, all of the predicates for the Court's ruling in that case also establish a common law right to habeas that Congress could not suspend without meeting the requirements of the Suspension Clause. Thus, Congress' passage of the MCA following *Rasul* does nothing to alter the Court's conclusion that the detainees have a right to habeas.

Petitioners agree with Judge Rogers that it is only by "ignoring" *Rasul* that the D.C. Circuit was able to dismiss petitioners' pending habeas cases. App. 23. Beginning with its reliance on Justice Scalia's dissent instead of the Court's analysis in *Rasul* on the historical reach of the writ and continuing through its repeated invocation of *Eisentrager* as the foundation for its decision, the D.C. Circuit seems to have decided the issues before it as if *Rasul* did not exist. The majority opinion, upholding Congress' purported elimination of the courts' jurisdiction over petitioners' habeas cases and denying petitioners' entitlement to the very right this Court previously proclaimed that petitioners, "no less than American citizens, are entitled to invoke," 542 U.S. at 481, effectively renders *Rasul* meaningless. Moreover, it raises questions that go to the essential meaning and purpose of habeas and the Suspension Clause, and of the constitutional separation of powers established by our Founders.

Those important constitutional questions can be decided only by this Court. They should be decided now; petitioners have entered their sixth year of imprisonment without being charged or afforded their day in court, and the denial of those basic hallmarks of American justice and fair dealing to the

prisoners at Guantanamo has become a matter of national and international debate. The Court should grant the petition and decide these important issues.[25]

1. The Decision Ignores *Rasul*

The D.C. Circuit's decision is remarkable. Approximately four years ago the D.C. Circuit affirmed the dismissal of the *Rasul* and *Al Odah* petitions, holding that *Eisentrager* compelled the dismissal of habeas petitions filed by aliens detained outside the technical "sovereignty" of the United States. *Al Odah v. United States*, 321 F.3d 1134.

On June 24, 2004, this Court reversed, pointing out that these cases are fundamentally different from *Eisentrager* – the petitioners here are not enemy aliens, they deny that they have ever engaged in or supported hostilities against the United States, they have never been charged or convicted of any wrongdoing, and they are "imprisoned in territory over which the United States exercises exclusive jurisdiction and control." *Rasul*, 542 U.S. at 476. The Court rejected in every respect the D.C. Circuit's reliance on *Eisentrager,* and the theory that the Guantanamo detainees' rights depended on notions of "ultimate sovereignty." *Id.* at 475-79, 484-85. The Court found that the Guantanamo detainees are being detained "within 'the territorial jurisdiction' of the United States," that they have the right to habeas under the federal habeas statute, and that application of the statute to them is "consistent with the historic reach of the writ" at common law. *Id.* at 480-81.

Yet, two weeks ago, the D.C. Circuit again dismissed these habeas petitions and, again, it relied principally on *Eis-*

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[25] This petition is being filed contemporaneously with the petition in *Boumediene v. Bush, et al.*, Nos. 05-5062 and 05-5063, which seeks review of the same judgment of the Court of Appeals with respect to *In re Guantanamo Detainee Cases*. Because of the overlap in issues between the two petitions, the Court may wish to consider granting both petitions.

entrager to do so. It characterized as "immaterial" the distinctions this Court drew in *Rasul* between Guantanamo and the German prison in *Eisentrager,* and it ruled that, under *Eisentrager*, the right to habeas, to which this Court held petitioners were entitled, was not protected by the Suspension Clause. App. 14-22. Based on *Eisentrager*, it held that these petitioners would not have had access to the writ at common law (*Eisentrager*, it said, "ends any doubt about the scope of common law habeas"), and that they have no constitutional rights whatsoever. App. 14-15.

To the majority below, it as if *Rasul* never happened. Indeed, to the extent the D.C. Circuit paid any regard to *Rasul*, it chose to elevate Justice Scalia's dissenting analysis and conclusions regarding the historic reach of the writ at common law over those of the Court. *See* App. 15. Whatever authority Congress may have to override the decisions of this Court – and on matters involving the constitutional limits on its authority, it is questionable whether it has any – the lower federal courts certainly have none.

2. The Decision Misconceives and Misapplies The Suspension Clause

This Court also should grant review to clarify the scope of the Suspension Clause of the Constitution. Article I, Section 9, Clause 2 of the Constitution provides: "The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Unlike the Fourth, Fifth, and Sixth Amendments, this Clause does not itself confer rights on individuals. Rather, it provides constitutional protection to a preexisting right founded in the common law; the right to obtain independent judicial review of a detention to ensure that no person is deprived of liberty by the Executive without reasonable basis in law and fact. The Founders considered that right essential; as Alexander Hamilton explained: "the practice of arbitrary imprisonments, [has] been, in all ages, the

favorite and most formidable instruments of tyranny," and habeas corpus is the "remedy for this fatal evil." Federalist No. 84.

The Suspension Clause protects that fundamental right from intrusion by the legislature in times of political crisis. It is a direct, plain, and explicit limit on the power of Congress. That is why the Framers placed it in Article I of the Constitution. It permits Congress to suspend the writ only in certain, narrowly defined circumstances, and no others. Unless those circumstances exist – and they clearly do not – Congress may not suspend the writ. Congress may no more suspend the writ in the absence of "Rebellion" or "Invasion" consistently with Article I, Section 9, Clause 2 of the Constitution than it may tax exports consistently with Article I, Section 9, Clause 4. It could not impose an export tax on a foreign national abroad any more than it could impose one on a U.S. citizen at home. It is simply without power to do so.

Congress has authorized suspension of the Great Writ only four times, and each occurred during times of indisputable, and congressionally declared, rebellion or invasion.[26] There are no congressional findings of rebellion or invasion in the MCA. Thus, Congress has no power to suspend the writ.

This Court has not yet resolved whether the protections of the Suspension Clause encompass all of the evolutions the writ has undergone since 1789. The Court has emphasized, however, that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301. Therefore, to determine if petitioners' right to habeas is protected by the Suspension Clause, the initial inquiry to be made is whether they would have had a right to the writ "as it existed in 1789."

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[26] *See* William F. Duker, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 149, 178 n.190 (1980).

As Judge Rogers pointed out, this Court answered that question in the affirmative in *Rasul*. The Court concluded that "[a]pplication of the habeas statute to persons detained at the [Guantanamo Bay naval] base is consistent with the historical reach of the writ of habeas corpus." *Rasul*, 542 U.S. at 481. The Court pointed out that "[a]t common law, courts exercised habeas jurisdiction [not only] over the claims of aliens detained within sovereign territory of the realm [but also over] the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control." *Id.* at 481-82 (footnotes omitted). The Court cited Lord Mansfield, who wrote in 1759 that, "even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.'" *Id.* at 482.

The Court thus found that the common law writ of habeas corpus, as of 1759, applied to aliens detained outside the realm but in territories under the subjection of the Crown. The Court also noted that "[l]ater cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" *Id.* at 482.[27] Given those findings, it was not only unnecessary, but also improper for the D.C. Circuit to determine for itself whether the writ would have been available to petitioners at common law. This Court had already answered that question.

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[27] Congress has long recognized the applicability of that Clause in U.S. controlled territories outside the United States. For example, in 1902, during a rebellion against U.S. authority in the Philippines, Congress authorized the suspension of the writ for the duration of any "rebellion, insurrection, or invasion," and the writ was thereafter suspended in two rebellious provinces in the Philippines. *See* Act of July 1, 1902, ch. 1369, 32 Stat. 691; *Fisher v. Baker*, 203 U.S. 174, 179 (1906).

Nonetheless, the D.C. Circuit engaged in its own inquiry on the matter. App. 10-14. And, rather than paying heed to this Court's analysis and conclusion, it instead favored Justice Scalia's dissent in *Rasul,* which disagreed with the Court's analysis and conclusion. App. 14-15. This was plain error. The Court was well aware of Justice Scalia's dissenting views and rejected them. *Rasul*, 542 U.S. at 482 n.14. The D.C. Circuit was bound to follow the Court's analysis in *Rasul*, not the dissent, and hold accordingly that, because habeas would have been available to petitioners at common law, petitioners' right to habeas is protected by the Suspension Clause.

As Judge Rogers pointed out, the relevant question is not whether a particular case existed as of 1789 that is on all fours with the present petitions. The question is whether these petitions fall within the core of what habeas was intended to safeguard under the common law. As challenges to the legality of indefinite detention by the Executive, they fall directly within that core. As the Court has emphasized: "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301.

This Court has never failed to accord habeas a scope appropriate to the writ's "grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). As the Court noted in *Rasul*, at common law, the right to habeas to challenge executive detention turned not on technical notions of sovereignty, but on the degree of control over the territory and the power to enforce the writ. *Rasul*, 542 U.S. at 481-82. At common law, the executive could not bypass habeas review of its actions by deliberately housing prisoners in a leased territory, such as Guantanamo, where it exercised complete and total control if not *de jure* sovereignty. Such attempts to establish lawless en-

claves are contrary to the essential purpose of habeas at common law, as a check on illegal executive imprisonment.

The government may avoid neither petitioners' right to habeas nor the Suspension Clause's protection of that right by placing these petitioners at Guantanamo. This Court should confirm that the Suspension Clause protects petitioners' fundamental right, founded in the common law, to obtain habeas review of their detentions.

3. The Decision Impermissibly Denies Petitioners the Fundamental Protections of the Constitution

The D.C. Circuit held that petitioners have no rights under any part of the Constitution and therefore cannot claim protection under the Suspension Clause. App. 15-21. It relied on *Eisentrager* for this holding, again ignoring the distinctions between that case and these. Petitioners agree with Judge Rogers that their right to habeas corpus is protected under the Suspension Clause even if they have no other protections under the Constitution. Petitioners submit, however, that as prisoners held in U.S. custody at Guantanamo, an area within the complete jurisdiction and control of the United States, they are entitled "no less than American citizens" to the fundamental protections of the Constitution, including due process of law, before being locked up forever at the Executive's behest. The Court should decide that issue now, before these petitioners are forced to endure many more months and years deprived of their liberty without fair process.

This Court has already decided the issues that are central to holding that petitioners are entitled to fundamental constitutional protections. Most importantly, the Court found in *Rasul* that Guantanamo, where petitioners are incarcerated, is "a territory over which the United States exercises plenary and exclusive jurisdiction" and that it is "within 'the territorial jurisdiction' of the United States." 542 U.S. at 475. That finding distinguishes the present case not only from

Eisentrager, but also from *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), where this Court declined to apply the warrant requirement of the Fourth Amendment to a search of the Mexican residence of a Mexican national. As Justice Kennedy explained in his concurrence in *Verdugo*, "the differing . . . conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does here." 494 U.S. at 278. But there is no such potential for conflict or need for cooperation with foreign sovereigns at Guantanamo. No other sovereign exercises jurisdiction there. The United States exercises complete jurisdiction and control at Guantanamo.

As Justice Kennedy pointed out in his concurrence in *Rasul*: "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities . . . . From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." 542 U.S. at 487.[28]

It was on this basis that Judge Green concluded that "Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply." *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 464. In fact, this Court has long held that constitutional protections from arbitrary government action apply to aliens as well as to U.S. citizens in foreign territories controlled by the United States. In one of the early *Insular Cases*, this Court recognized the importance of preserving fundamental constitutional protections for alien inhabitants of territories

[28] As the U.S. Navy's own website says, Guantanamo, "for all practical purposes, is American territory," and "the United States . . . exercise[s] the essential elements of sovereignty over this territory." Rear Admiral M.E. Murphy, 1 *The History of Guantanamo Bay*, ch. 3 (1953), http://www.nsgtmo.navy.mil/history/gtmohistorymurphyvol1ch3.htm.

held and controlled by the United States, observing that fundamental and "personal" constitutional protections undoubtedly apply to aliens in such territories. *Downes v. Bidwell*, 182 U.S. 244 (1901) ("[e]ven if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property.").

Application of core constitutional protections to aliens outside of the United States, but in territories controlled by the United States, was again affirmed by this Court in *Balzac v. Porto Rico*, 258 U.S. 298 (1922). The Court explained that, although particular rights such as trial by jury might not apply, there was no question that other core constitutional protections applied to both citizens and aliens in a U.S.-controlled territory: "The guaranties of certain fundamental personal rights declared in the Constitution, *as for instance that no person could be deprived of life, liberty or property without due process of law*, had from the beginning full application in the Philippines and Porto Rico . . . ." *Id.* at 312-13 (emphasis added).

In *Rasul*, this Court explicitly rejected the proposition that petitioners' rights depend on whether the United States has technical "'sovereignty'" over Guantanamo. 542 U.S. at 475. With regard to the writ of habeas corpus, the Court noted with approval that the reach of the writ at common law "depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" *Id.* at 482. The reason, very simply, was to prevent the sovereign from avoiding court review of its actions simply by taking its prisoners outside the territory. Wherever the sovereign acted, and certainly whenever it acted within areas under its exclusive jurisdiction and control, it could not avoid the law.

The same should be true with respect to fundamental constitutional protections. Making the reach of those protec-

tions turn on technical sovereignty would allow the Executive to define the limits of the Constitution and avoid constitutional restraints on its authority simply by electing to detain people beyond our formal sovereign borders. It would permit the Executive to create law-free zones, negotiating leases for prisons abroad over which it exercised complete jurisdiction and control without acquiring technical sovereignty. It would grant the government a blank check to establish prisons outside the United States that are wholly outside the law.

Even the D.C. Circuit implicitly recognized that, if petitioners had been brought to the United States — if their U.S. captors had decided, upon reaching the eastern coastline of the United States, to turn the plane right and fly the detainees to a military facility in Virginia, rather than left, to the U.S. Naval Base at Guantanamo — they would have been entitled to invoke the protections afforded to detained persons by the Constitution, including those available under the Due Process Clause and the Suspension Clause. *See* App. 17-18 (noting that Guantanamo is not a "Territory or other Property belonging to the United States" and that "presence" in the United States is the criteria by which an alien's constitutional rights are determined). The Executive should not be granted the authority to create a constitutional loophole – or more accurately, a constitutional "black hole." Application of the Constitution should not depend on whether the government decides to turn the plane "left" or "right."[29]

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[29] One of the petitioners, David Hicks, was removed from U.S. sovereign territory, where he was first detained, so that the government could detain him at Guantanamo. Mr. Hicks was initially brought to and detained on a U.S. naval vessel for over a month before being transferred to Guantanamo. A naval vessel indisputably is sovereign U.S. territory, as this Court has recognized for more than a century. *See United States v. Rogers*, 50 U.S. 249, 260 (1893); *United States v. Flores*, 289 U.S. 137, 159 (1933); *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953). Courts have long addressed the merits of habeas claims brought by those detained on vessels, including one of the cases cited by the D.C. Circuit as an exam-

This is not a hypothetical issue. As mentioned, John Yoo, the former Deputy Assistant Attorney General in the Office of Legal Counsel of the Department of Justice, who played a key role in orchestrating the Administration's Guantanamo policy, bluntly admitted that the government chose Guantanamo precisely to avoid legal review of its actions:

> No location was perfect, but the U.S. Naval Station at Guantanamo Bay, Cuba, seemed to fit the bill. . . . [T]he federal courts probably wouldn't consider Gitmo as falling within their habeas jurisdiction . . .[30]

Petitioners submit that they cannot be held indefinitely in an area under exclusive U.S. jurisdiction and control without being afforded core constitutional protections, including protections under the Due Process Clause and the Suspension Clause. Petitioners are not asking the Court to engage in a novel analysis regarding what constitutional standards should apply. In *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-35 (2004), the Court decided that a citizen detained following capture on the battlefield in the conflict in Afghanistan is entitled to basic due process protections, including the right to

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ple of a habeas claim brought in sovereign territory. *See The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (1865). Therefore, although petitioners dispute the D.C. Circuit's opinion that the reach of fundamental constitutional protections turns on notions of technical sovereignty, even under that opinion Mr. Hicks undoubtedly was held as a captive within U.S. sovereign territory and is entitled to invoke the protections afforded to detained persons by the Due Process Clause and the Suspension Clause. Respondents cannot void those protections by removing Mr. Hicks to Guantanamo.

[30] *See generally* John Yoo, *War By Other Means: An Insider's Account of the War on Terror* (2006) at 142. Yoo explains that, from the beginning, Guantanamo was intended to provide U.S. officials with a place where they could interrogate detainees without having to worry whether either the detention or the interrogation tactics employed were lawful. *Id.* at 151.

receive notice of the factual basis for the detention, a fair opportunity to rebut the government's assertions, and the right to be heard before a neutral decision-maker "at a meaningful time and in a meaningful manner."

Those basic due process safeguards are also the minimum that justice requires for the prisoners held within U.S. jurisdiction at Guantanamo. As Justice Jackson stated over 50 years ago in the midst of the hysteria sweeping the nation over the spread of communism:

> Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is just outside our gates. . . . [A]n alien who has come within our jurisdiction . . . must meet a fair hearing with fair notice of the charges. It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone.[31]

What ultimately is at stake here is America's commitment to its core values and the rule of law. That commitment requires that the D.C. Circuit's decision be reversed and that this Court make clear that our government cannot evade the core constitutional limits on its authority – and the fundamental values of fairness for which our country is known – simply by placing its prisoners in areas beyond our technical sovereignty.

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[31] *Shaughnessy v. United States*, 345 U.S. 206, 219, 228 (1953) (Jackson, J., dissenting). Justice Jackson further cautioned: "Let it not be overlooked that due process of law is not for the sole benefit of the accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to appear on *ex parte* consideration." *Id.* at 224-25.

4. The MCA Does Not Clearly and Explicitly Revoke Habeas Jurisdiction Over These Pending Cases.

The Court can avoid the serious constitutional issues described above by construing the MCA, as it is drafted, as not revoking habeas jurisdiction over these pending cases. The Court has emphasized that there is a "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous *statutory directives* to effect a repeal." *Id.* at 299 (emphasis added). *See Ex parte Yerger*, 75 U.S. 85, 102, 104 (1868) (the courts "are not at liberty to except from [habeas jurisdiction] any cases not plainly excepted by law," and may not read a statute repealing habeas jurisdiction "to have any further effect than that plainly apparent from its terms").

The MCA by its terms does not revoke jurisdiction over pending habeas actions. As the government has pointed out, section 7(a) of the MCA purports to revoke jurisdiction over two distinct categories of cases: (1) "application[s] for a writ of habeas corpus" and (2) "other action[s]" that relate "to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of aliens determined by the United Sates to have properly detained as enemy combatants. The effective date provisions in subsection 7(b) of the MCA, however, apply the jurisdiction-stripping provision only to *pending* cases in the latter category—that is, those relating to "any aspect of the detention, transfer, treatment, trial, or conditions of detention."

Section 7(b) also stands in stark contrast to section 3(a) of the MCA, adding 10 U.S.C. § 950j, where Congress explicitly refers to habeas corpus in purporting to eliminate jurisdiction over *pending* actions relating to the prosecution, trial, or judgment of a military commission:

> Except as otherwise provided in this chapter and notwithstanding any other provision of law (**including section 2241 of title 28 or any other habeas corpus provision**), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action **pending on or filed after the date of enactment** of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter . . .

MCA § 3(a), 10 U.S.C. § 950j(b) (emphasis added). The D.C. Circuit paid scant attention to the difference between the language of the two sections. But it is significant. Congress withdrew jurisdiction over pending cases in two sections of the MCA: in one – section 3(a) – it expressly included habeas cases, and in the other – section 7(b) – it did not. By including habeas cases in section 3(a) and omitting mention of them in section 7(b), Congress indicated that section 7(b) should not apply to pending habeas cases.[32]

5. Most Of Petitioners' Treaty-Based Habeas Claims Were Improperly Dismissed

Finally, this case presents the issue of whether petitioners may enforce applicable treaty-based claims through habeas. Judge Green correctly held that the Geneva Conventions are self-executing and enforceable through habeas by petitioners allegedly connected to the Taliban. 355 F. Supp. 2d at 478-79. However, she erroneously dismissed the Geneva Conventions claims of those petitioners allegedly connected to al Qaeda on the ground that al Qaeda was not a "High Contracting Party" to the Conventions. *Id.* at 479.

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[32] *See, e.g., Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2765 (2006); *BPF v. RTC*, 511 U.S. 531, 537 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another") (quoting *Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994)).

Judge Green's decision runs afoul of this Court's ruling in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). First, the Court in *Hamdan* reversed as "erroneous" the D.C. Circuit's conclusion that the Geneva Conventions cannot be enforced through habeas by an individual alleged to be connected to al Qaeda, holding that Hamdan, a Guantanamo detainee alleged to be connected to al Qaeda, could enforce through habeas claims that the government violated Common Article 3 of the Conventions. 126 S. Ct. at 2795-96. Second, the Court in *Hamdan* implicitly endorsed the independent enforceability of Geneva Conventions rights and held that law-of-war constraints in treaties that are incorporated in legislation and imposed by Congress on the President's war powers are enforceable through habeas. *Id.*

Therefore, petitioners, including those allegedly connected to al Qaeda, may enforce through habeas the Geneva Conventions as well as other law-of-war constraints incorporated in the AUMF, which is the source of the President's power to detain them.[33] *See Hamdi v. Rumsfeld*, 542 U.S. 507, 517-18 (2004) (plurality opinion). It is important that the Court review and reverse the lower court's contrary ruling even though the D.C. Circuit did not address this issue. Given the long delay since *Rasul*, and the clarity of the Court's decision on this point in *Hamdan*, it would be unfair and unjust not to address this issue now.

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[33] Although section 5(a) of the MCA purports to bar the invocation of the Geneva Conventions as a "source of rights," it does not preclude the invocation of the rules embodied in the Conventions where the "source of right" is established by legislation. Moreover, Congress could not, without raising serious constitutional questions, bar habeas review of Geneva Conventions claims that otherwise would support habeas relief unless it abrogated or superseded the Conventions so as to deprive them of their status as U.S. law. *See, e.g., Henderson v. INS*, 157 F.3d 106, 119-22 (2d Cir. 1998). In any event, section 5(a) does not even purport to apply to pending actions and presumptively does not apply to petitioners' cases. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994).

CONCLUSION

The Court should grant this petition for a writ of *certiorari* to the Court of Appeals.

Respectfully submitted,

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MARCH 5, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 8, 2005 Decided February 20, 2007

No. 05-5062

LAKHDAR BOUMEDIENE, DETAINEE, CAMP DELTA, ET AL.,
Appellants,

v.

GEORGE W. BUSH, President of The United States, *et al.*,
Appellees.

Consolidated with
05-5063

Appeals from the United States District Court
for the District of Columbia
(No. 04cv01142)
(No. 04cv01166)

No. 05-5064

KHALED A. F. AL ODAH, NEXT FRIEND OF FAWZI KHALID
ABDULLAH FAHAD AL ODAH *et al.*,
Appellees/Cross-Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellants/Cross-Appellees.

App. 2

Consolidated with
05-5095, 05-5096, 05-5097, 05-5098, 05-5099, 05-5100,
05-5101, 05-5102, 05-5103, 05-5104, 05-5105, 05-5106,
05-5107, 05-5108, 05-5109, 05-5110, 05-5111, 05-5112,
05-5113, 05-5114, 05-5115, 05-5116

Appeals from the United States District Court
for the District of Columbia
(No. 02cv00828) (No. 02cv00299) (No. 02cv01130)
(No. 02cv01135) (No. 02cv01136) (No. 02cv01137)
(No. 02cv01144) (No. 02cv01164) (No. 02cv01194)
(No. 02cv01227) (No. 02cv01254)

Before: SENTELLE, RANDOLPH and ROGERS, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge*

RANDOLPH. Dissenting opinion filed by *Circuit Judge* ROGERS.

RANDOLPH, *Circuit Judge:* Do federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at the Guantanamo Bay Naval Base in Cuba? The question has been the recurring subject of legislation and litigation. In these consolidated appeals, foreign nationals held at Guantanamo filed petitions for writs of habeas corpus alleging violations of the Constitution, treaties, statutes, regulations, the common law, and the law of nations. Some detainees also raised non-habeas claims under the federal question statute, 28 U.S.C. § 1331, and the Alien Tort Act, *id.* § 1350. In the "Al Odah" cases (Nos. 05-5064, 05-5095 through 05-5116), which consist of eleven cases involving fifty-six detainees, Judge Green denied the government's motion to dismiss with respect to the claims arising from alleged violations of the Fifth Amendment's Due Process Clause and the Third

Geneva Convention, but dismissed all other claims. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). After Judge Green certified the order for interlocutory appeal under 28 U.S.C. § 1292(b), the government appealed and the detainees cross-appealed. In the "Boumediene" cases (Nos. 05-5062 and 05-5063)—two cases involving seven detainees—Judge Leon granted the government's motion and dismissed the cases in their entirety. *See Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

In the two years since the district court's decisions the law has undergone several changes. As a result, we have had two oral arguments and four rounds of briefing in these cases during that period. The developments that have brought us to this point are as follows.

In *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004), we affirmed the district court's dismissal of various claims—habeas and non-habeas—raised by Guantanamo detainees. With respect to the habeas claims, we held that "no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees." 321 F.3d at 1141. The habeas statute then stated that "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a) (2004). Because Guantanamo Bay was not part of the sovereign territory of the United States, but rather land the United States leases from Cuba, *see Al Odah*, 321 F.3d at 1142-43, we determined it was not within the "respective jurisdictions" of the district court or any other court in the United States. We therefore held that § 2241 did not provide statutory jurisdiction to consider habeas relief for any alien—enemy or not—held at Guantanamo. *Id.* at 1141. Regarding the non-habeas claims, we noted that "'the privilege of litigation' does not extend to aliens in military custody who have no presence

in 'any territory over which the United States is sovereign,'" *id.* at 1144 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950)), and held that the district court properly dismissed those claims.

The Supreme Court reversed in *Rasul v. Bush*, 542 U. S. 466 (2004), holding that the habeas statute extended to aliens at Guantanamo. Although the detainees themselves were beyond the district court's jurisdiction, the Court determined that the district court's jurisdiction over the detainees' custodians was sufficient to provide subject-matter jurisdiction under § 2241. *See Rasul*, 542 U.S. at 483-84. The Court further held that the district court had jurisdiction over the detainees' non-habeas claims because nothing in the federal question statute or the Alien Tort Act categorically excluded aliens outside the United States from bringing such claims. *See Rasul*, 542 U. S. at 484- 85. The Court remanded the cases to us, and we remanded them to the district court.

In the meantime Congress responded with the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (DTA), which the President signed into law on December 30, 2005. The DTA added a subsection (e) to the habeas statute. This new provision stated that, "[e]xcept as provided in section 1005 of the [DTA], no court, justice, or judge" may exercise jurisdiction over

> (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
>
> (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who
>
> (A) is currently in military custody; or

> (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit . . . to have been properly detained as an enemy combatant.

DTA § 1005(e)(1) (internal quotation marks omitted). The "except as provided" referred to subsections (e)(2) and (e)(3) of section 1005 of the DTA, which provided for exclusive judicial review of Combatant Status Review Tribunal determinations and military commission decisions in the D.C. Circuit. *See* DTA § 1005(e)(2), (e)(3).

The following June, the Supreme Court decided *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Among other things, the Court held that the DTA did not strip federal courts of jurisdiction over habeas cases pending at the time of the DTA's enactment. The Court pointed to a provision of the DTA stating that subsections (e)(2) and (e)(3) of section 1005 "shall apply with respect to any claim . . . that is pending on or after the date of the enactment of this Act." DTA § 1005(h). In contrast, no provision of the DTA stated whether subsection (e)(1) applied to pending cases. Finding that Congress "chose not to so provide . . . after having been presented with the option," the Court concluded "[t]he omission [wa]s an integral part of the statutory scheme." *Hamdan*, 126 S. Ct. at 2769.

In response to *Hamdan*, Congress passed the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (MCA), which the President signed into law on October 17, 2006. Section 7 of the MCA is entitled "Habeas Corpus Matters." In subsection (a), Congress again amended § 2241(e). The new amendment reads:

> (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

> (2) Except as provided in [section 1005(e)(2) and (e)(3) of the DTA], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

MCA § 7(a) (internal quotation marks omitted). Subsection (b) states:

> The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to *all cases, without exception, pending on or after the date of the enactment* of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

MCA § 7(b) (emphasis added).

The first question is whether the MCA applies to the detainees' habeas petitions. If the MCA does apply, the second question is whether the statute is an unconstitutional suspension of the writ of habeas corpus.[1]

I.

As to the application of the MCA to these lawsuits, section 7(b) states that the amendment to the habeas corpus statute, 28 U.S.C. § 2241(e), "shall apply to all cases, without exception, pending on or after the date of the enactment" that

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[1] Section 7(a) of the MCA eliminates jurisdiction over non-habeas claims by aliens detained as enemy combatants. That alone is sufficient to require dismissal even of pending non-habeas claims. *See Bruner v. United States*, 343 U.S. 112, 116-17 (1952). Section 7(b) reinforces this result.

relate to certain subjects. The detainees' lawsuits fall within the subject matter covered by the amended § 2241(e); each case relates to an "aspect" of detention and each deals with the detention of an "alien" after September 11, 2001. The MCA brings all such "cases, without exception" within the new law.

Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule *Hamdan*.[2]

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[2] Without exception, both the proponents and opponents of section 7 understood the provision to eliminate habeas jurisdiction over pending cases. *See, e.g.*, 152 Cong. Rec. S10357 (daily ed. Sept. 28, 2006) (statement of Sen. Leahy) ("The habeas stripping provisions in the bill go far beyond what Congress did in the Detainee Treatment Act . . . . This new bill strips habeas jurisdiction retroactively, even for pending cases."); *id.* at S 10367 (statement of Sen. Graham) ("The only reason we are here is because of the *Hamdan* decision. The *Hamdan* decision did not apply . . . the [DTA] retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now."); *id.* at S10403 (statement of Sen. Cornyn) ("[O]nce . . . section 7 is effective, Congress will finally accomplish what it sought to do through the [DTA] last year. It will finally get the lawyers out of Guantanamo Bay. It will substitute the blizzard of litigation instigated by *Rasul v. Bush* with a narrow DC Circuit-only review of the [CSRT] hearings."); *id.* at S10404 (statement of Sen. Sessions) ("It certainly was not my intent, when I voted for the DTA, to exempt all of the pending Guantanamo lawsuits from the provisions of that act. * * * Section 7 of the [MCA] fixes this feature of the DTA and ensures that there is no possibility of confusion in the future. . . . I don't see how there could be any confusion as to the effect of this act on the pending Guantanamo litigation. The MCA's jurisdictional bar applies to that litigation 'without exception.'"); 152 Cong. Rec. H7938 (daily ed. Sept. 29, 2006) (statement of Rep. Hunter) ("The practical effect of [section 7] will be to eliminate the hundreds of detainee lawsuits that are pending in courts throughout the country and to consolidate all detainee treatment cases in the D.C. Circuit."); *id.* at H7942 (Rep. Jackson-Lee) ("The habeas provisions in the legislation are contrary to congressional intent in the [DTA]. In that act, Congress did not intend to strip the courts of jurisdiction over the pending habeas [cases].").

Everyone, that is, except the detainees. Their cases, they argue, are not covered. The arguments are creative but not cogent. To accept them would be to defy the will of Congress. Section 7(b) could not be clearer. It states that "the amendment made by subsection (a)"—which repeals habeas jurisdiction—applies to "all cases, without exception" relating to any aspect of detention. It is almost as if the proponents of these words were slamming their fists on the table shouting "When we say 'all,' we mean all—**without exception !**"[3]

The detainees of course do not see it that way. They say Congress should have expressly stated in section 7(b) that habeas cases were included among "all cases, without exception, pending on or after" the MCA became law. Otherwise, the MCA does not represent an "unambiguous statutory directive[]" to repeal habeas corpus jurisdiction. *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). This is nonsense. Section 7(b) specifies the effective date of section 7(a). The detainees' argument means that Congress, in amending the habeas statute (28 U.S.C. § 2241), specified an effective date only for non-habeas cases. Of course Congress did nothing of the sort. Habeas cases are simply a subset of cases dealing with detention. *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973).[4] Congress did not have to say that "the

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[3] Congress has rarely found it necessary to emphasize the *absence* of exceptions to a clear rule. Indeed, the use of "without exception" to emphasize the word "all" occurs in only one other provision of the U.S. Code. *See* 48 U.S.C. § 526(a).

[4] If section 7(b) did not include habeas cases among cases "which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention," it would be inconsistent with section 7(a). Section 7(a) of the MCA first repeals jurisdiction "to hear or consider an application for a writ of habeas corpus" by detainees. 28 U.S.C. § 2241(e)(1). It then repeals jurisdiction over "any *other* action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of a detainee, *id.* § 2241(e)(2) (emphasis added), thus

amendment made by subsection (a)"—which already *expressly* includes habeas cases—shall take effect on the date of enactment and shall apply to "all cases, without exception, *including habeas cases*." The *St. Cyr* rule of interpretation the detainees invoke demands clarity, not redundancy.

The detainees also ask us to compare the language of section 7(b) to that of section 3 of the MCA. Section 3, entitled "Military Commissions," creates jurisdiction in the D.C. Circuit for review of military commission decisions, *see* 10 U.S.C. § 950g. It then adds 10 U.S.C. § 950j, which deals with the finality of military commission decisions. Section 950j strips federal courts of jurisdiction over any pending or future cases that would involve review of such decisions:

> Except as otherwise provided in this chapter and notwithstanding any other provision of law *(including section 2241 of title 28 or any other habeas corpus provision)*, no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

10 U.S.C. § 950j(b) (emphasis added). The detainees maintain that § 950j calls into question Congress's intention to apply section 7(b) to pending habeas cases.

The argument goes nowhere. Section 7(b), read in conjunction with section 7(a), is no less explicit than § 950j. Section 7(a) strips jurisdiction over detainee cases, including habeas

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signifying that Congress considered habeas cases as cases relating to detention, as indeed they are.

cases, and section 7(b) makes section 7(a) applicable to pending cases. Section 950j accomplishes the same thing, but in one sentence. A drafting decision to separate section 7 into two subsections—one addressing the scope of the jurisdictional bar, the other addressing how the bar applies to pending cases—makes no legal difference.[5]

II.

This brings us to the constitutional issue: whether the MCA, in depriving the courts of jurisdiction over the detainees' habeas petitions, violates the Suspension Clause of the Constitution, U.S. CONST. art. I, § 9, cl. 2, which states that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The Supreme Court has stated the Suspension Clause protects the writ "as it existed in 1789," when the first

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[5] The detainees suggest that federal courts retain some form of residual common law jurisdiction over habeas petitions. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807), holds the opposite. *See Ex parte McCardle*, 74 U.S. 506 (1868). "Jurisdiction of the lower federal courts is . . . limited to those subjects encompassed within a statutory grant of jurisdiction." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). The observations about common law habeas in *Rasul*, 542 U.S. at 481-82, referred to the practice in England. Even if there were such a thing as common law jurisdiction in the federal courts, § 2241(e)(1) quite clearly eliminates all "jurisdiction to hear or consider an application for a writ of habeas corpus" by a detainee, whatever the source of that jurisdiction.

In order to avoid "serious 'due process,' Suspension Clause, and Article III problems," the detainees also urge us not to read section 7 of the MCA to eliminate habeas jurisdiction over Geneva Convention claims. But that reading is unavoidable. Section 7 is unambiguous, as is section 5(a), which states that "No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding . . . as a source of rights in any court of the United States."

Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus. *St. Cyr*, 533 U.S. at 301; *cf.* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 170 (1970). The detainees rely mainly on three cases to claim that in 1789 the privilege of the writ extended to aliens outside the sovereign's territory. In *Lockington's Case*, Bright. (N.P.) 269 (Pa. 1813), a British resident of Philadelphia had been imprisoned after failing to comply with a federal marshal's order to relocate. The War of 1812 made Lockington an "enemy alien" under the Alien Enemies Act of 1798. Although he lost on the merits of his petition for habeas corpus before the Pennsylvania Supreme Court, two of three Pennsylvania justices held that he was entitled to review of his detention.[6] In *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779), three Spanish seamen had boarded a merchant vessel bound for England with a promise of wages on arrival. After arriving in England, the English captain refused to pay their wages and turned them over to a warship as prisoners of war. The King's Bench denied the sailors' petitions because they were "alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus." *Id.* at 776. The detainees claim that, as in *Lockington's Case*, the King's Bench exercised jurisdiction and reached the merits. The third case—*Rex v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759)—involved a citizen of Sweden intent on entering the English merchant trade. While at sea on an English merchant's ship, a French privateer took Schiever along with the rest of the crew as prisoners, transferred the

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[6] During this period, state courts often employed the writ of habeas corpus to inquire into the legality of federal detention. The Supreme Court later held in *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859), and *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871), that state courts had no such power.

crew to another French ship, and let the English prisoners go free. An English ship thereafter captured the French ship and its crew, and carried them to Liverpool where Schiever was imprisoned. From Liverpool Schiever petitioned for habeas corpus, claiming he was a citizen of Sweden and only by force entered the service of the French. The court denied him relief because it found ample evidence that he was a prisoner of war. *Id.* at 552.

None of these cases involved an alien outside the territory of the sovereign. Lockington was a resident of Philadelphia. And the three Spanish sailors and Schiever were all held within English sovereign territory.[7] The detainees cite no case and no historical treatise showing that the English common law writ of habeas corpus extended to aliens beyond the Crown's dominions. Our review shows the contrary. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 53 (1980); 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 116-17, 124 (1982 ED.); 3 BLACKSTONE, COMMENTARIES 131 (1768); *see also* 1 Op. Att'y Gen. 47 (1794); *In re Ning Yi-Ching*, 56 T. L. R. 3, 5 (Vacation Ct. 1939) (noting prior judge "had listened in vain for a case in which the writ of *habeas corpus* had issued in respect of a foreigner detained in a part of the world which was not a part of the King's dominions or realm"). Robert Chambers, the successor to Blackstone at Oxford, wrote in his lectures that the writ ofhabeas corpus extended only to the King's dominions. 2 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW DELIVERED AT OXFORD 1767-1773 (composed in association with Samuel Johnson), at 7-8

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[7] The dissent claims that the difference between Schiever and the detainees is "exceedingly narrow," Dissent at 14, because Schiever was brought *involuntarily* to Liverpool. For this proposition, the dissent cites *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). *Verdugo-Urquidez* was a Fourth Amendment case. Obviously, it had nothing to say about habeas corpus in Eighteenth Century England.

(Thomas M. Curley ed., 1986). Chambers cited *Rex v. Cowle*, 97 Eng. Rep. (2 Burr.) 587 (K.B. 1759), in which Lord Mansfield stated that "[t]o foreign dominions . . . this Court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland, or to the electorate; but to Ireland, the Isle of Man, the plantations [American colonies] . . . we may." Every territory that Mansfield, Blackstone, and Chambers cited as a jurisdiction to which the writ extended (e.g., Ireland, the Isle of Man, the colonies, the Cinque Ports, and Wales) was a sovereign territory of the Crown.

When agents of the Crown detained prisoners outside the Crown's dominions, it was understood that they were outside the jurisdiction of the writ. *See* HOLDSWORTH, *supra,* at 116-17. Even British citizens imprisoned in "remote islands, garrisons, and other places" were "prevent[ed] from the benefit of the law," 2 HENRY HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 127-28 (William S. Hein Co. 1989) (1827), which included access to habeas corpus, *see* DUKER, *supra,* at 51-53; HOLDSWORTH, *supra,* at 116; *see also* Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1, 8 (2004) ("the writ of habeas corpus would not be available" in "remote islands, garrisons, and other places" (internal quotation marks omitted)). Compliance with a writ from overseas was also completely impractical given the habeas law at the time. In *Cowle*, Lord Mansfield explained that even in the far off territories "annexed to the Crown," the Court would not send the writ, "notwithstanding the power." 97 Eng. Rep. at 600. This is doubtless because of the Habeas Corpus Act of 1679. The great innovation of this statute was in setting time limits for producing the prisoner and imposing fines on the custodian if those limits were not met. *See* CHAMBERS, *supra,* at 11. For a prisoner detained over 100 miles from the court, the detaining officer had twenty days after receiving the writ to produce the body before the court. *See id.* If he did not produce the body, he incurred a fine. One can easily imagine the practical

problems this would have entailed if the writ had run outside the sovereign territory of the Crown and reached British soldiers holding foreign prisoners in overseas conflicts, such as the War of 1812. The short of the matter is that given the history of the writ in England prior to the founding, habeas corpus would not have been available in 1789 to aliens without presence or property within the United States.

Johnson v. Eisentrager, 339 U.S. 763 (1950), ends any doubt about the scope of common law habeas. "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Id.* at 768; *see also* Note, *Habeas Corpus Protection Against Illegal Extraterritorial Detention*, 51 COLUM. L. REV. 368, 368 (1951). The detainees claim they are in a different position than the prisoners in *Eisentrager*, and that this difference is material for purposes of common law habeas.[8] They point to dicta in *Rasul*, 542 U. S. 481-82, in which the Court discussed English habeas cases and the "historical reach of the writ." *Rasul* refers to several English and American cases involving varying combinations of territories of the Crown and relationships between the petitioner and the country in which the writ was sought. *See id.* But as Judge Robertson found in *Hamdan,* "[n]ot one of the cases mentioned in *Rasul* held that an alien captured abroad and detained outside the United States—or in 'territory over which the United States exercises exclusive jurisdiction and control,' *Rasul*, 542 U.S. at 475—had a

[8] The detainees are correct that they are not "enemy aliens." That term refers to citizens of a country with which the United States is at war. *See Al Odah*, 321 F.3d at 1139-40. But under the common law, the dispositive fact was not a petitioner's enemy alien status, but his lack of presence within any sovereign territory.

common law or constitutionally protected right to the writ of habeas corpus." *Hamdan v. Rumsfeld*, No. 04-1519, 2006 WL 3625015, at *7 (D.D.C. Dec. 13, 2006). Justice Scalia made the same point in his *Rasul* dissent, *see Rasul*, 542 U. S. at 502-05 & n.5 (Scalia, J., dissenting) (noting the absence of "a single case holding that aliens held outside the territory of the sovereign were within reach of the writ"), and the dissent acknowledges it here, *see* Dissent at 12. We are aware of no case prior to 1789 going the detainees' way,[9] and we are convinced that the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government.

The detainees encounter another difficulty with their Suspension Clause claim. Precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States. As we explained in *Al Odah*, 321 F.3d at 1140-41, the controlling case is *Johnson v. Eisentrager*. There twenty-one German nationals confined in custody of the U.S. Army in Germany filed habeas corpus petitions. Although the German prisoners alleged they were civilian agents of the German government, a military commission convicted them of war crimes arising from military activity against the United States in China after Germany's surrender. They claimed their convictions and imprisonment violated various constitutional provisions and the Geneva Conventions. The Supreme Court rejected the proposition "that the Fifth

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[9] The dissent claims the lack of any case on point is a result of the unique combination of circumstances in this case. But extraterritorial detention was not unknown in Eighteenth Century England. *See* HOLDSWORTH, *supra*, at 116-17; DUKER, *supra*, at 51-53. As noted, *supra*, these prisoners were beyond the protection of the law, which included access to habeas corpus. And *Eisentrager* (and the two hundred other alien petitioners the court noted, *see* 339 U.S. at 768 n.1) involved both extraterritorial detention and alien petitioners.

Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses," 339 U.S. at 783. The Court continued: "If the Fifth Amendment confers its rights on all the world . . . [it] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments." *Id.* at 784. (Shortly before Germany's surrender, the Nazis began training covert forces called "werewolves" to conduct ter rorist activities during the Allied occupation. *See* http://www.archives.gov/iwg/declassified_records/oss_records_263_wilhelm_hoettl.html.)

Later Supreme Court decisions have followed *Eisentrager*. In 1990, for instance, the Court stated that *Eisentrager* "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). After describing the facts of *Eisentrager* and quoting from the opinion, the Court concluded that with respect to aliens, "our rejection of extraterritorial application of the Fifth Amendment was emphatic." *Id.* By analogy, the Court held that the Fourth Amendment did not protect nonresident aliens against unreasonable searches or seizures conducted outside the sovereign territory of the United States. *Id.* at 274-75. Citing *Eisentrager* again, the Court explained that to extend the Fourth Amendment to aliens abroad "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries," particularly since the government "frequently employs Armed Forces outside this country," *id.* at 273. A decade after *Verdugo-Urquidez*, the Court—again citing *Eisentrager*—found it "well established that certain constitutional pro-

tections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).[10]

Any distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held, is immaterial to the application of the Suspension Clause. The United States occupies the Guantanamo Bay Naval Base under an indefinite lease it entered into in 1903. *See Al Odah*, 321 F.3d at 1142. The text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba—not the United States—has sovereignty over Guantanamo Bay. *See VermilyaBrown Co. v. Connell*, 335 U.S. 377, 381 (1948); *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412 (11th Cir. 1995). The "determination of sovereignty over an area," the Supreme Court has held, "is for the legislative and executive departments." *Vermilya-Brown*, 335 U.S. at 380. Here the political departments have firmly and clearly spoken: "'United States,' when used in a geographic sense . . . does not include the United States Naval Station, Guantanamo Bay, Cuba." DTA § 1005(g).

The detainees cite the *Insular Cases* in which "fundamental personal rights" extended to U.S. territories. *See Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922); *Dorr v. United States*, 195 U.S. 138, 148 (1904); *see also Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977). But in each of those cases, Congress had exercised its power under Article IV, Section 3 of the Constitution to regulate "Territory or other Property belonging to the United States," U. S. CONST., art. IV, § 3, cl.

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[10] The *Rasul* decision, resting as it did on statutory interpretation, *see* 542 U.S. at 475, 483-84, could not possibly have affected the constitutional holding of *Eisentrager*. Even if *Rasul* somehow calls *Eisentrager*'s constitutional holding into question, as the detainees suppose, we would be bound to follow *Eisentrager*. *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484-85 (1989).

2. These cases do not establish anything regarding the sort of *de facto* sovereignty the detainees say exists at Guantanamo. Here Congress and the President have specifically disclaimed the sort of territorial jurisdiction they asserted in Puerto Rico, the Philippines, and Guam.

Precedent in this circuit also forecloses the detainees' claims to constitutional rights. In *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002), we quoted extensively from *Verdugo-Urquidez* and held that the Court's description of *Eisentrager* was "firm and considered dicta that binds this court." Other decisions of this court are firmer still. Citing *Eisentrager*, we held in *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) (per curiam), that "non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States." The law of this circuit is that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999); *see also 32 County Sovereignty Comm. v. U.S. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002).[11]

As against this line of authority, the dissent offers the distinction that the Suspension Clause is a limitation on congressional power rather than a constitutional right. But this is no distinction at all. Constitutional rights are rights against the

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[11] The text of the Suspension Clause also does not lend itself freely to extraterritorial application. The Clause permits suspension of the writ only in cases of "Rebellion or Invasion," neither of which is applicable to foreign military conflicts. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 593-94 (2004) (Thomas, J., dissenting); *see also* J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. (forthcoming 2007) (manuscript at 59-60, *available at* http://ssrn.com/abstract=888602).

government and, as such, *are* restrictions on governmental power. *See H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534 (1949) ("Even the Bill of Rights amendments were framed only as a limitation upon the powers of Congress.").[12] Consider the First Amendment. (In contrasting the Suspension Clause with provisions in the Bill of Rights, *see* Dissent at 3, the dissent is careful to ignore the First Amendment.) Like the Suspension Clause, the First Amendment is framed as a limitation on Congress: "Congress shall make no law . . . ." Yet no one would deny that the First Amendment protects the rights to free speech and religion and assembly.

The dissent's other arguments are also filled with holes. It is enough to point out three of the larger ones.

There is the notion that the Suspension Clause is different from the Fourth, Fifth, and Sixth Amendments because it does not mention individuals and those amendments do (respectively, "people," "person," and "the accused"). *See* Dissent at 3. Why the dissent thinks this is significant eludes us. Is the point that if a provision does not mention individuals there is no constitutional right? That cannot be right. The First Amendment's guarantees of freedom of speech and free exercise of religion do not mention individuals; nor does the Eighth Amendment's prohibition on cruel and unusual punishment or the Seventh Amendment's guarantee of a civil jury. Of course it is fair to assume that these provisions apply to individuals, just as it is fair to assume that petitions for writs of habeas corpus are filed by individuals.

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[12] James Madison's plan was to insert almost the entire Bill of Rights into the Constitution rather than wait for amendment. His proposed location of the Bill of Rights? Article I, Section 9—next to the Suspension Clause. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 700-01 & n.437 (1999).

The dissent also looks to the Bill of Attainder and Ex Post Facto Clauses, both located next to the Suspension Clause in Article I, Section 9. We do not understand what the dissent is trying to make of this juxtaposition. The citation to *United States v. Lovett*, 328 U.S. 303 (1946), is particularly baffling. *Lovett* held only that the Bill of Attainder Clause was justiciable. The dissent's point cannot be that the Bill of Attainder Clause and the Ex Post Facto Clause do not protect individual rights. Numerous courts have held the opposite.[13] "The fact that the Suspension Clause abuts the prohibitions on bills of attainder and ex post facto laws, provisions well-accepted to protect individual liberty, further supports viewing the habeas privilege as *a core individual right.*" Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 374 & n.227 (2006) (emphasis added).[14]

Why is the dissent so fixated on how to characterize the Suspension Clause? The unstated assumption must be that the reasoning of our decisions and the Supreme Court's in denying constitutional rights to aliens outside the United States would not apply if a constitutional provision could be characterized as protecting something other than a "right." On this theory, for example, aliens outside the United States are entitled to the protection of the Separation of Powers because

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[13] *See South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) ("[C]ourts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups . . . .") (citing *United States v. Brown*, 381 U.S. 437 (1965); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866)); *see also Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005); *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468-69 (1977); *Shabazz v. Gabry*, 123 F.3d 909, 912 (6th Cir. 1997).

[14] *Accord* Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 318, 321 (2000) ("[W]e could easily describe [Article I,] Section 9 as a bill of rights for the people of the United States.").

they have no individual rights under the Separation of Powers. Where the dissent gets this strange idea is a mystery, as is the reasoning behind it.

III.

Federal courts have no jurisdiction in these cases. In supplemental briefing after enactment of the DTA, the government asked us not only to decide the habeas jurisdiction question, but also to review the merits of the detainees' designation as enemy combatants by their Combatant Status Review Tribunals. *See* DTA § 1005(e)(2).[15] The detainees objected to converting their habeas appeals to appeals from their Tribunals. In briefs filed after the DTA became law and after the Supreme Court decided *Hamdan*, they argued that we were without authority to do so.[16] Even if we have authority to convert the habeas appeals over the petitioners' objections, the record does not have sufficient information to perform the review the DTA allows. Our only

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[15] *See* Supplemental Br. of the Federal Parties Addressing the Detainee Treatment Act of 2005 53-54 ("This Court can and should convert the pending appeals into petitions for review under [DTA section] 1005(e)(2).").

[16] *See* The Guantanamo Detainees' Supplemental Br. Addressing the Effect of the Supreme Ct.'s Op. in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), on the Pending Appeals 8-9 ("The detainees in the pending petitions challenge the lawfulness of their detentions—not the subsequent CSRT decisions . . . ."); Corrected Supplemental Br. of Pet'rs Boumediene, et al., & Khalid Regarding Section 1005 of the Detainee Treatment Act of 2005 56-59 ("Nothing in the [DTA] authorizes the Court to 'convert' Petitioners' notices of appeal of the district court's judgment into original petitions for review of CSRT decisions under section 1005(e)(2) of the Act."); The Guantanamo Detainees' Corrected Second Supplemental Br. Addressing the Effect of the Detainee Treatment Act of 2005 on this Ct.'s Jurisdiction over the Pending Appeals 43-44 ("[T]his court should not convert these petitions into petitions for review under the DTA as the government suggests.").

recourse is to vacate the district courts' decisions and dismiss the cases for lack of jurisdiction.

So ordered.

ROGERS, *Circuit Judge*, dissenting: I can join neither the reasoning of the court nor its conclusion that the federal courts lack power to consider the detainees' petitions. While I agree that Congress intended to withdraw federal jurisdiction through the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), the court's holding that the MCA is consistent with the Suspension Clause of Article I, section 9, of the Constitution does not withstand analysis. By concluding that this court must reject "the detainees' claims to constitutional rights," Op. at 21, the court fundamentally misconstrues the nature of suspension: Far from conferring an individual right that might pertain only to persons substantially connected to the United States, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), the Suspension Clause is a limitation on the powers of Congress. Consequently, it is only by misreading the historical record and ignoring the Supreme Court's well-considered and binding dictum in *Rasul v. Bush*, 542 U.S. 466, 481-82 (2004), that the writ at common law would have extended to the detainees, that the court can conclude that neither this court nor the district courts have jurisdiction to consider the detainees' habeas claims.

A review of the text and operation of the Suspension Clause shows that, by nature, it operates to constrain the powers of Congress. Prior to the enactment of the MCA, the Supreme Court acknowledged that the detainees held at Guantanamo had a statutory right to habeas corpus. *Rasul*, 542 U.S. at 483-84. The MCA purports to withdraw that right but does so in a manner that offends the constitutional constraint on suspension. The Suspension Clause limits the removal of habeas corpus, at least as the writ was understood at common law, to times of rebellion or invasion unless Congress provides an adequate alternative remedy. The writ would have reached the detainees at common law, and Congress has neither provided an adequate alternative remedy, through the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, tit. X,

119 Stat. 2680, 2739 ("DTA"), nor invoked the exception to the Clause by making the required findings to suspend the writ. The MCA is therefore void and does not deprive this court or the district courts of jurisdiction.

On the merits of the detainees' appeal in *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005) and the cross-appeals in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), I would affirm in part in *Guantanamo Detainee Cases* and reverse in *Khalid* and remand the cases to the district courts.

I.

Where a court has no jurisdiction it is powerless to act. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-74 (1803). But a statute enacted by Congress purporting to deprive a court of jurisdiction binds that court only when Congress acts pursuant to the powers it derives from the Constitution. The court today concludes that the Suspension Clause is an individual right that cannot be invoked by the detainees. *See* Op. at 22. The text of the Suspension Clause and the structure of the Constitution belie this conclusion. The court further concludes that the detainees would have had no access to the writ of habeas corpus at common law. *See* Op. at 14-17. The historical record and the guidance of the Supreme Court disprove this conclusion.

In this Part, I address the nature of the Suspension Clause, the retroactive effect of Congress's recent enactment on habeas corpus—the MCA—and conclude with an assessment of the effect of the MCA in light of the dictates of the Constitution.

A.

The court holds that Congress may suspend habeas corpus as to the detainees because they have no individual rights under the Constitution. It is unclear where the court finds that

the limit on suspension of the writ of habeas corpus is an individual entitlement. The Suspension Clause itself makes no reference to citizens or even persons. Instead, it directs that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. This mandate appears in the ninth section of Article I, which enumerates those actions expressly excluded from Congress's powers. Although the Clause does not specifically say so, it is settled that only Congress may do the suspending. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); *see Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting); *Ex parte Merryman*, 17 F. Cas. 144, 151-152 (No. 9487) (Taney, Circuit Justice, C.C.D. Md. 1861); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1342 (5th ed. 1891). In this manner, by both its plain text and inclusion in section 9, the Suspension Clause differs from the Fourth Amendment, which establishes a "right of the people," the Fifth Amendment, which limits how a "person shall be held," and the Sixth Amendment, which provides rights to "the accused." These provisions confer rights to the persons listed.[1]

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[1] The Suspension Clause is also distinct from the First Amendment, which has been interpreted as a guarantor of individual rights. *See, e.g., United States v. Robel*, 389 U.S. 258, 263 (1967); *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The court cannot seriously maintain that the two provisions are alike while acknowledging that the First Amendment confers an individual right enforceable by the courts and simultaneously claiming that the Suspension Clause does not, *see* Op. at 13 n.5 (citing *Bollman*, 8 U.S. (4 Cranch) at 95); *see also In re Barry*, 42 F. 113, 122 (C.C.S.D.N.Y. 1844), *error dismissed sub nom. Barry v. Mercein*, 46 U.S. 103 (1847) ("The ninth section of the first article of the constitution, par. 2, declaring that 'the privilege of the writ of habeas corpus shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it,' does not purport to convey power or jurisdiction to the judiciary. It is in restraint of executive and legislative powers, and no further affects the judiciary than to impose on them the necessity, if the

The other provisions of Article I, section 9, indicate how to read the Suspension Clause. The clause immediately following provides that "[n]o Bill of Attainder or ex post facto Law shall be passed."[2] The Supreme Court has construed the Attainder Clause as establishing a "category of Congressional actions which the Constitution barred." *United States v. Lovett*, 328 U.S. 303, 315 (1946). In *Lovett*, the Court dismissed the possibility that an Act of Congress in violation of the Attainder Clause was non-justiciable, remarking:

> Our Constitution did not contemplate such a result. To quote Alexander Hamilton,
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> > * * * a limited constitution * * * [is] one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; *whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.* Without this, all the reservations of particular rights or privileges would amount to nothing.

Id. at 314 (quoting THE FEDERALIST NO. 78) (emphasis added) (alteration and omissions in original). So too, in *Weaver v. Graham*, 450 U.S. 24, 28-29 & n.10 (1981), where the Court noted that the ban on *ex post facto* legislation "restricts governmental power by restraining arbitrary and

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privilege of habeas corpus is suspended by any authority, to decide whether the exigency demanded by the constitution exists to sanction the act.").

[2] Suspensions and bills of attainder have a shared history. In England, suspensions occasionally named specific individuals and therefore amounted to bills of attainder. *See* Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 339 (1952).

potentially vindictive legislation" and acknowledged that the clause "confin[es] the legislature to penal decisions with prospective effect." *See also Marbury*, 5 U.S. (1 Cranch) at 179-80; *Foretich v. United States*, 351 F.3d 1198, 1216-26 (D.C. Cir. 2003). For like reasons, any act in violation of the Suspension Clause is void, *cf. Lovett,* 328 U.S. at 316, and cannot operate to divest a court of jurisdiction.[3]

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[3] The court cites a number of cases for the proposition that the Attainder Clause confers an individual right instead of operating as a structural limitation on Congress. *See* Op. at 23 n.13. None of these cases makes the court's point. In *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966), the Supreme Court held that it is not a bill of attainder for Congress to punish a state. This speaks to the definition of a bill of attainder and says nothing about the operation of the Attainder Clause. *Weaver v. Graham*, 450 U.S. 24, 30 (1981), says the opposite of what the court asserts. In *Weaver*, the Supreme Court emphasized that the *Ex Post Facto* Clause is not intended to protect individual rights but governs the operation of government institutions:

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

The Court also emphasized the structural nature of the limitations of Article I, section 9, in *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 469 (1977) (noting that "the Bill of Attainder Clause [is] . . . one of the organizing principles of our system of government"). Unsurprisingly, the court cites no authority that would support its novel construction of section 9 by providing that certain individuals lack Attainder Clause or *Ex Post Facto* Clause rights.

The court dismisses the distinction between individual rights and limitations on Congress's powers. It chooses to make no affirmative argument of its own, instead hoping to rebut the sizable body of conflicting authorities.

The court appears to believe that the Suspension Clause is just like the constitutional amendments that form the Bill of Rights.[4] It is a truism, of course, that individual rights like those found in the first ten amendments work to limit Congress. However, individual rights are merely a subset of those matters that constrain the legislature. These two sets cannot be understood as coextensive unless the court is prepared to recognize such awkward individual rights as Commerce Clause rights, *see* U.S. CONST. art. I, § 8, cl. 3, or the personal right not to have a bill raising revenue that originates in the Senate, *see* U.S. CONST. art. I, § 7, cl. 1; *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 224 (1974) (finding no individual right under the Ineligibility Clause).

That the Suspension Clause appears in Article I, section 9, is not happenstance. In Charles Pinckney's original proposal, suspension would have been part of the judiciary provision. It was moved in September 1789 by the Committee on Style and Arrangement, which gathered the restrictions on Congress's power in one location. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 128-32 (1980); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 596 (Max Farrand ed., rev. ed. 1966). By the court's

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[4] For this point, the court quotes, without context, from *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949), *see* Op. at 22. In that case, the Supreme Court emphasized that the Bill of Rights limited the powers of Congress and did not affect the powers of the individual states, *H.P. Hood & Sons*, 336 U.S. at 534, at least until certain amendments were incorporated after ratification of the Fourteenth Amendment. This says nothing about the distinction, relevant here, between individual rights and limitations on Congress.

reasoning, the Framers placed the Suspension Clause in Article I merely because there were no similar individual rights to accompany it. It is implausible that the Framers would have viewed the Suspension Clause, as the court implies, as a budding Bill of Rights but would not have assigned the provision its own section of the Constitution, much as they did with the only crime specified in the document, treason, which appears alone in Article III, section 3. Instead, the court must treat the Suspension Clause's placement in Article I, section 9, as a conscious determination of a limit on Congress's powers. The Supreme Court has found similar meaning in the placement of constitutional clauses ever since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419-21 (1819) (Necessary and Proper Clause); *see also, e.g., Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 220-21 (1989) (Taxing Clause).

The court also alludes to the idea that the Suspension Clause cannot apply to foreign military conflicts because the exception extends only to cases of "Rebellion or Invasion." Op. at 21 n. 11. The Framers understood that the privilege of the writ was of such great significance that its suspension should be strictly limited to circumstances where the peace and security of the Nation were jeopardized. Only after considering alternative proposals authorizing suspension "on the most urgent occasions" or forbidding suspension outright did the Framers agree to a narrow exception upon a finding of rebellion or invasion. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 438. Indeed, it would be curious if the Framers were implicitly sanctioning Executive-ordered detention abroad without judicial review by limiting suspension—and by the court's reasoning therefore limiting habeas corpus—to domestic events. To the contrary, as Alexander Hamilton foresaw in *The Federalist No. 84*, invoking William Blackstone,

> To bereave a man of life (says he), or by violence to confiscate his estate, without accusation or trial, would

> be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government.

THE FEDERALIST NO. 84, at 468 (E.H. Scott ed. 1898) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *131-32); *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 125 (1866).

B.

This court would have jurisdiction to address the detainees' claims but for Congress's enactment of the MCA. In *Rasul*, 542 U.S. at 483-84, the Supreme Court held that the federal district courts had jurisdiction to hear petitions for writs of habeas corpus filed pursuant to 28 U.S.C. § 2241 by persons detained as "enemy combatants" by the United States at the Guantanamo Bay Naval Base. At the time, the habeas statute provided, in relevant part, that upon the filing of such a petition, the district court would promptly determine whether the petitioner was being held under the laws, Constitution, and treaties of the United States, utilizing the common-law procedure of a return filed by the government and a traverse filed by the petitioner. *See* 28 U.S.C. §§ 2242-2253. After *Rasul*, Congress enacted the DTA, which purported to deprive the federal courts of habeas jurisdiction. DTA § 1005(e), 118 Stat. at 2741-43. The Supreme Court held in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764-69 (2006), however, that the DTA does not apply retroactively, and so it does not disturb this court's jurisdiction over the instant appeals, which were already pending when the DTA became law.

As for the MCA, I concur in the court's conclusion that, notwithstanding the requirements that Congress speak clearly when it intends its action to apply retroactively, *see Landgraf*

v. USI Film Prods., 511 U.S. 244, 265-73 (1994), and when withdrawing habeas jurisdiction from the courts, *see INS v. St. Cyr*, 533 U.S. 289, 299 (2001); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1869), Congress sought in the MCA to revoke all federal jurisdiction retroactively as to the habeas petitions of detainees held at Guantanamo Bay. *See* Op. at 9-12. I do not join the court's reasoning. The court stresses Congress's emphasis that the provision setting the effective date for the jurisdictional change "shall apply to all cases, without exception." However, the absence of exceptions does not establish the scope of the provision itself. The entire provision reads:

> (b)—EFFECTIVE DATE. The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act *which relate to* any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

MCA § 7(b), 120 Stat. at 2636 (emphasis added). Subsection (a), in turn, amends 28 U.S.C. § 2241(e), which confers habeas jurisdiction on the federal courts. New section 2241(e)(1) repeals "jurisdiction to hear or consider an application for a writ of habeas corpus." New section 2241(e)(2) repeals "jurisdiction to hear or consider any other action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement."

The detainees suggest that by singling out habeas corpus in § 2241(e)(1) and by failing to do so in section 7(b)—and instead repeating the same list ("detention, transfer, treatment, trial, or conditions of confinement") that appears in § 2241(e)(2)—Congress was expressing its intent to make the MCA retroactive only as to § 2241(e)(2). This argument hinges on their view that a petition for a writ of habeas corpus

is not "relating to any aspect of . . . detention." But, by the plain text of section 7, it is clear that the detainees suggest ambiguity where there is none. As the court notes, *see* Op. at 11 n. 4, whereas § 2241(e)(1) refers to habeas corpus, § 2241(e)(2) deals with "any *other* action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement." (Emphasis added). By omitting the word "other" in section 7(b), and by cross-referencing section 7(a) in its entirety, Congress signaled its intent for the retroactivity provision to apply to habeas corpus cases. This conclusion has nothing to do with Congress's emphasis that there are no exceptions and everything to do with the intent it expressed through the substantive provisions of the statute.

C.

The question, then, is whether by attempting to eliminate all federal court jurisdiction to consider petitions for writs of habeas corpus, Congress has overstepped the boundary established by the Suspension Clause. The Supreme Court has stated on several occasions that *"at the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)) (emphasis added). Therefore, at least insofar as habeas corpus exists and existed in 1789, Congress cannot suspend the writ without providing an adequate alternative except in the narrow exception specified in the Constitution.[5] This proscription applies equally to

[5] It is unnecessary to resolve the question of whether the Constitution provides for an affirmative right to habeas corpus—either through the Suspension Clause, the Fifth Amendment guarantee of due process, or the Sixth Amendment—or presumed the continued vitality of this "writ antecedent to statute," *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945) (internal quotation marks omitted). Because the Supreme Court in *Rasul* held that the writ existed in 2004 and that there was, therefore, something to suspend, it is sufficient to assess whether the writ sought here existed in 1789. Given my conclusion, *see infra* Part C.1, it is also unnecessary to resolve the question of whether the Suspension Clause protects the writ of

removing the writ itself and to removing all jurisdiction to issue the writ. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.2 (4th ed. 2003).

1.

Assessing the state of the law in 1789 is no trivial feat, and the court's analysis today demonstrates how quickly a few missteps can obscure history. In conducting its historical review, the court emphasizes that no English cases predating 1789 award the relief that the detainees seek in their petitions. Op. at 15-17. "The short of the matter," the court concludes, is that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." Op. at 17. But this misses the mark. There may well be no case at common law in which a court exercises jurisdiction over the habeas corpus claim of an alien from a friendly nation, who may himself be an enemy, who is captured abroad and held outside the sovereign territory of England but within the Crown's exclusive control without being charged with a crime or violation of the Laws of War. On the other hand, the court can point to no case where an English court has refused to exercise habeas jurisdiction because the enemy being held, while under the control of the Crown, was not within the Crown's dominions.[6] The paucity

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habeas corpus as it has developed since 1789. *Compare St. Cyr*, 533 U.S. at 304-05, *and LaGuerre v. Reno*, 164 F.3d 1035, 1038 (7th Cir. 1998), *with Felker*, 518 U.S. at 663-64, *and* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 970 (1998). The court oddly chooses to ignore the issue by truncating its reference to *St. Cyr*, without comment, and omitting the qualifier "at the absolute minimum." *See* Op. at 14.

[6] The court's assertion that "extraterritorial detention was not unknown in Eighteenth Century England," Op. at 18 n.9, is of no moment. The court references the 1667 impeachment of the Earl of Clarendon, Lord High Chancellor of England. *See id.* at 16, 18 n.9. Clarendon was accused of sending enemies to faraway lands to deprive them of effective legal

of direct precedent is a consequence of the unique confluence of events that defines the situation of these detainees and not a commentary on the reach of the writ at common law.

The question is whether by the process of inference from similar, if not identical, situations the reach of the writ at common law would have extended to the detainees' petitions. At common law, we know that "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" *Rasul*, 542 U. S. at 482 (quoting *Ex parte Mwenya*, [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.)). We also know that the writ extended not only to citizens of the realm, but to aliens, *see id.* at 481 & n.11, even in wartime, *see id.* at 474-75; *Case of Three Spanish Sailors*, 2 Black. W. 1324, 96 Eng. Rep. 775 (C.P. 1779); *Rex v. Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K.B. 1759). A War of 1812-era case in which Chief Justice John Marshall granted a habeas writ to a British subject establishes that even conceded enemies of the United States could test in its courts detention that they claimed was unauthorized. *See* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 GREEN BAG 2D 39 (2005) (reporting *United States v. Williams* (C.C.D. Va. Dec. 4, 1813)).

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process. The court makes the unsupported inference that habeas corpus was therefore unavailable abroad. Nothing in the Clarendon affair suggests that habeas corpus was sought and refused. Instead, as remains the case today, legal process can be evaded when prisoners are detained without access to the courts. That the detainees at Guantanamo were able to procure next friends and attorneys to pursue their petitions whereas seventeenth-century Englishmen would have found this difficult, if not impossible, says nothing about the availability of the writ at common law. The court's obfuscation as to the distinction between impracticality and unavailability is further addressed *infra*.

To draw the ultimate conclusion as to whether the writ at common law would have extended to aliens under the control (if not within the sovereign territory) of the Crown requires piecing together the considerable circumstantial evidence, a step that the court is unwilling to take. Analysis of one of these cases, the 1759 English case of *Rex v. Schiever*, shows just how small this final inference is. Barnard Schiever was the subject of a neutral nation (Sweden), who was detained by the Crown when England was at war with France. *Schiever*, 2 Burr. at 765, 97 Eng. Rep. at 551. He claimed that his classification as a "prisoner of war" was factually inaccurate, because he "was desirous of entering into the service of the merchants of England" until he was seized on the high seas by a French privateer, which in turn was captured by the British Navy. *Id.* In an affidavit, he swore that his French captor "detained him[] against his will and inclination . . . and treated him with so much severity[] that [his captor] would not suffer him to go on shore when in port . . . but closely confined him to duty [on board the ship]." *Id.* at 765-66, 97 Eng. Rep. at 551. The habeas court ultimately determined, on the basis of Schiever's own testimony, that he was properly categorized and thus lawfully detained. *Id.* at 766, 97 Eng. Rep. at 551-52.

The court discounts *Schiever* because, after England captured the French privateer while en route to Norway, it was carried into Liverpool, England, where Schiever was held in the town jail. *Id.*, 97 Eng. Rep. at 551. As such, the case did not involve "an alien outside the territory of the sovereign." Op. at 14-15. However, Schiever surely was not *voluntarily* brought into England, so his mere presence conferred no additional rights. As the Supreme Court observed in *Verdugo-Urquidez*, "involuntary [presence] is not the sort to indicate any substantial connection with our country." 494 U.S. at 271. Any gap between *Schiever* and the detainees' detention at Guantanamo Bay is thus exceedingly narrow.

This court need not make the final inference. It has already been made for us. In *Rasul*, the Supreme Court stated that "[a]pplication of the habeas statute to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus." 542 U. S. at 481. By reaching a contrary conclusion, the court ignores the settled principle that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003) (quoting *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997)) (internal quotation marks omitted). Even setting aside this principle, the court offers no convincing analysis to compel the contrary conclusion. The court makes three assertions: First, Lord Mansfield's opinion in *Rex v. Cowle*, 2 Burr. 834, 97 Eng. Rep. 587 (K.B. 1759), disavows the right claimed by the detainees. Second, it would have been impractical for English courts to extend the writ extraterritorially. Third, *Johnson v. Eisentrager*, 339 U.S. 763 (1949), is controlling. None of these assertions withstands scrutiny.

In *Cowle*, Lord Mansfield wrote that "[t]here is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety." 2 Burr. at 856, 97 Eng. Rep. at 599. He noted thereafter, by way of qualification, that the writ would not extend "[t]o foreign dominions, which belong to a prince who succeeds to the throne of England." *Id.*, 97 Eng. Rep. at 599- 600. Through the use of ellipsis marks, the court excises the qualification and concludes that the writ does not extend "[t]o foreign dominions." Op. at 16. This masks two problems in its analysis. A "foreign dominion" is not a foreign country, as the court's reasoning implies, but rather "a country which at some time formed part of the dominions of a foreign state or potentate, but which by conquest or cession has become a part of the dominions of the Crown of England." *Ex parte Brown*, 5 B. & S. 280, 122 Eng. Rep. 835 (K.B. 1864). And

the exception noted in Lord Mansfield's qualification has nothing to do with extraterritoriality: Instead, habeas from mainland courts was unnecessary for territories like Scotland that were controlled by princes in the line of succession because they had independent court systems. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES *95-98; James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497, 512- 13 (2006). In the modern-day parallel, where a suitable alternative for habeas exists, the writ need not extend. *See* 2 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW DELIVERED AT OXFORD 1767-1773, at 8 (Thomas M. Curley, ed., 1986) (quoting *Cowle* as indicating that, notwithstanding the power to issue the writ "in *Guernsey, Jersey, Minorca,* or the *plantations*," courts would not think it "proper to interpose" because "the most usual way is to complain to the *king in Council*, the supreme court of appeal from those provincial governments"); *see also infra* Part C.2. The relationship between England and principalities was the only instance where it was "found necessary to restrict the scope of the writ." 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 124 (1938). *Cowle*, by its plain language, then, must be read as recognizing that the writ of habeas corpus ran even to places that were "no part of the realm," where the Crown's other writs did not run, nor did its laws apply. 2 Burr. at 835-36, 853- 55, 97 Eng. Rep. at 587-88, 598-99. The Supreme Court has adopted this logical reading. *See Rasul*, 542 U. S. at 481-82; *see also* Mitchell B. Malachowski, *From Gitmo with Love: Redefining Habeas Corpus Jurisdiction in the Wake of the Enemy Combatant Cases of 2004*, 52 NAVAL L. REV. 118, 122- 23 (2005).[7]

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[7] The significance of a 1794 opinion by the U.S. Attorney General, *see* Op. at 15, which expresses the view that the writ should issue to the foreign commander of a foreign ship-of-war in U.S. ports, reasoning that the foreign ship has "no exemption from the jurisdiction of the country

The court next disposes of *Cowle* and the historical record by suggesting that the "power" to issue the writ acknowledged by Lord Mansfield can be explained by the Habeas Corpus Act of 1679, 31 Car. 2, c. 2. *See* Op. at 16. The Supreme Court has stated that the Habeas Corpus Act "enforces the common law," *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1730), thus hardly suggesting that the "power" recognized by Lord Mansfield was statutory and not included within the 1789 scope of the common-law writ. To the extent that the court makes the curious argument that the Habeas Corpus Act would have made it too impractical to produce prisoners if applied extraterritorially because it imposed fines on jailers who did not quickly produce the body, Op. at 16-17, the court cites no precedent that suggests that "practical problems" eviscerate "the precious safeguard of personal liberty [for which] there is no higher duty than to maintain it unimpaired," *Bowen v. Johnston,* 306 U. S. 19, 26 (1939). This line of reasoning employed by the court fails for two main reasons:

First, the Habeas Corpus Act of 1679 was expressly limited to those who "have beene committed for criminall or supposed criminall Matters." 31 Car. 2, c. 2, § 1. Hence, the burden of expediency imposed by the Act could scarcely have prevented common-law courts from exercising habeas jurisdiction in noncriminal matters such as the petitions in

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into which he comes," 1 Op. Att'y Gen. 47 (1794), is unclear. Nor is it clear what point the court is making by referencing *In re Ning Yi-Ching*, 56 T.L.R. 3 (K.B. Vacation Ct. 1939). In *Rasul*, the Supreme Court noted that *Ning Yi-Ching* "made quite clear that 'the remedy of *habeas corpus* was not confined to British subjects,' but would extend to 'any person . . . detained' within the reach of the writ," 542 U.S. at 483 n.13 (quoting *Ning Yi-Ching*, 56 T.L.R. at 5), and that the case does not support a "narrow view of the territorial reach of the writ," *id.* Here, the court provides a parenthetical quotation for *Ning Yi-Ching* that recalls a dissenting position from a prior case that was later repudiated. *See Rasul,* 542 U.S. at 483 n.14; *Mwenya*, [1960] 1 Q.B. at 295 (Lord Evershed, M.R.).

these appeals. Statutory habeas in English courts did not extend to non-criminal detention until the Habeas Corpus Act of 1816, 56 Geo. 3, c. 100, although courts continued to exercise their common-law powers in the interim. *See* 2 CHAMBERS, *supra*, at 11; 9 HOLDSWORTH, *supra*, at 121.

Second, there is ample evidence that the writ did issue to faraway lands. In *Ex parte Anderson*, 3 El. & El. 487, 121 Eng. Rep. 525 (Q.B. 1861), *superseded by statute*, 25 & 26 Vict., c. 20, § 1, the Court of Queen's Bench exercised its common-law powers to issue a writ of habeas corpus to Quebec in Upper Canada after expressly acknowledging that it was "sensible of the inconvenience which may result from such a step." *Id.* at 494-95, 121 Eng. Rep. at 527-28; *see also Brown*, 5 B. & S. 280, 122 Eng. Rep. 835 (issuing a writ to the Isle of Man in the sea between England and Ireland). English common-law courts also recognized the power to issue habeas corpus in India, even to non-subjects, and did so notwithstanding competition from local courts, well before England recognized its sovereignty in India. *See* B.N. PANDEY, THE INTRODUCTION OF ENGLISH LAW INTO INDIA 112, 149, 151 (1967); *see also Rex v. Mitter*, Morton 210 (Sup. Ct., Calcutta 1781), *reprinted in* 1 THE INDIAN DECISIONS (OLD SERIES) 1008 (T.A. Venkasawmy Row ed., 1911); *Rex v. Hastings*, Morton 206, 208-09 (Sup. Ct., Calcutta 1775) (opinion of Chambers, J.), *reprinted in* 1 THE INDIAN DECISIONS, *supra*, at 1005, 1007; *id.* at 209 (opinion of Impey, C. J.); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2530 n.156 (2005).

Finally, the court reasons that *Eisentrager* requires the conclusion that there is no constitutional right to habeas for those in the detainees' posture. *See* Op. at 17-18. In *Eisentrager*, the detainees claimed that they were "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*." 339 U.S. at 777. Thus *Eisentrager* presented a far different question than confronts

this court.[8] The detainees do not here contend that the Constitution accords them a positive right to the writ but rather that the Suspension Clause restricts Congress's power to eliminate a preexisting statutory right. To answer that question does not entail looking to the extent of the detainees' ties to the United States but rather requires understanding the scope of the writ of habeas corpus at common law in 1789. The court's reliance on *Eisentrager* is misplaced.

2.

This brings me to the question of whether, absent the writ, Congress has provided an adequate alternative procedure for challenging detention. If it so chooses, Congress may replace the privilege of habeas corpus with a commensurate procedure without overreaching its constitutional ambit. However, as the Supreme Court has cautioned, if a subject of Executive detention "were subject to any substantial procedural hurdles which ma[k]e his remedy . . . less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered [under the Suspension Clause]." *Sanders v. United States*, 373 U.S. 1, 14 (1963).

The Supreme Court has, on three occasions, found a replacement to habeas corpus to be adequate. In *United States v. Hayman*, 342 U.S. 205 (1952), the Court reviewed 42 U.S.C. § 2255, which extinguished the writ as to those convicted of federal crimes before Article III judges in exchange for recourse before the sentencing court. Prior to the enactment of section 2255, the writ was available in the jurisdiction of detention, not the jurisdiction of conviction. The Court concluded that this substitute was acceptable in part because the traditional habeas remedy remained available by statute where section 2255 proved "inadequate or inef-

[8] To the extent that the court relies on *Eisentrager* as proof of its historical theory, the Supreme Court rejected that approach in *Rasul*, *see* 542 U.S. at 475-79.

fective." *Id.* at 223. The Court came to a similar conclusion in *Swain v. Pressley*, 430 U.S. 372 (1977), reviewing a statute with a similar "inadequate or ineffective" escape hatch, *id.* at 381 (reviewing D.C. CODE § 23-110). In that case, the Court concluded that a procedure for hearing habeas in the District of Columbia's courts, as distinct from the federal courts, was an adequate alternative. Finally, in *Felker*, 518 U. S. at 663-64, the Court found no Suspension Clause violation in the restrictions on successive petitions for the writ under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217, concluding that these were "well within the compass of [the] evolutionary process" of the habeas corpus protocol for abuse of the writ and did not impose upon the writ itself.

These cases provide little cover for the government. As the Supreme Court has stated, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301. With this in mind, the government is mistaken in contending that the combatant status review tribunals ("CSRTs") established by the DTA suitably test the legitimacy of Executive detention. Far from merely adjusting the mechanism for vindicating the habeas right, the DTA imposes a series of hurdles while saddling each Guantanamo detainee with an assortment of handicaps that make the obstacles insurmountable.

At the core of the Great Writ is the ability to "inquire into illegal detention with a view to an order releasing the petitioner." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (internal quotation marks and alteration omitted). An examination of the CSRT procedure and this court's CSRT review powers reveals that these alternatives are neither adequate to test whether detention is unlawful nor directed toward releasing those who are unlawfully held.

"Petitioners in habeas corpus proceedings . . . are entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of the relevant facts." *Harris v. Nelson*, 394 U.S. 286, 298 (1969). The offerings of CSRTs fall far short of this mark. Under the common law, when a detainee files a habeas petition, the burden shifts to the government to justify the detention in its return of the writ. When not facing an imminent trial,[9] the detainee then must be afforded an opportunity to traverse the writ, explaining why the grounds for detention are inadequate in fact or in law. *See, e.g.*, 28 U.S.C. §§ 2253, 2248; *Bollman*, 8 U.S. (4 Cranch) at 125; *Ex parte Beeching*, 4 B. & C. 137, 107 Eng. Rep. 1010 (K.B. 1825); *Schiever*, 2 Burr. 765, 97 Eng. Rep. 551; *cf. Hamdi*, 542 U.S. at 53738 (plurality opinion). A CSRT works quite differently. *See* Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselnk.mil/ news/Jul2004/ d20040707review.pdf. The detainee bears the burden of coming forward with evidence explaining why he should *not* be detained. The detainee need not be informed of the basis for his detention (which may be classified), need not be allowed to introduce rebuttal evidence (which is sometimes deemed by the CSRT too impractical to acquire), and must proceed without the benefit of his own counsel.[10] Moreover,

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[9] At common law, where criminal charges were pending, a prisoner filing a habeas writ would be remanded, although habeas incorporated a speedy-trial guarantee. *See, e.g., Ex parte Beeching*, 4 B. & C. 137, 107 Eng. Rep. 1010 (K.B. 1825); *Bushell's Case*, Vaugh. 135, 124 Eng. Rep. 1006, 1009-10 (C.P. 1670). But see MCA § 3(a)(1), 120 Stat. at 2602 (codified at 10 U.S.C. § 948b(d)(A)). Once there was "a judgment of conviction rendered by a court of general criminal jurisdiction," release under the writ was unavailable. *Hayman*, 342 U.S. at 210-22.

[10] With a few possible exceptions, the Guantanamo detainees before the federal courts are unlikely to be fluent in English or to be familiar with legal procedures and, as their detentions far from home and cut off from their families have been lengthy, they are likely ill prepared to be able to

these proceedings occur before a board of military judges subject to command influence, *see Hamdan*, 126 S. Ct. at 2804, 2806 (Kennedy, J., concurring in part); *Weiss v. United States*, 510 U.S. 163, 179-80 (1994); *cf.* 10 U.S.C. § 837(a). Insofar as each of these practices impedes the process of determining the true facts underlying the lawfulness of the challenged detention, they are inimical to the nature of habeas review.

This court's review of CSRT determinations, *see* DTA § 1005(e)(2), 119 Stat. at 2742, is not designed to cure these inadequacies. This court may review only the record developed by the CSRT to assess whether the CSRT has complied with its own standards. Because a detainee still has no means to present evidence rebutting the government's case—even assuming the detainee could learn of its contents—assessing whether the government has more evidence in its favor than the detainee is hardly the proper antidote. The fact that this court also may consider whether the CSRT process "is consistent with the Constitution and laws of the United States," DTA § 1005(e)(2)(C)(ii), 119 Stat. at 2742, does not obviate the need for habeas. Whereas a cognizable constitutional, statutory, or treaty violation could defeat the lawfulness of the government's cause for detention, the writ issues whenever the Executive lacks a lawful justification for continued detention. The provisions of DTA § 1005(e)(2) cannot be reconciled with the purpose of habeas corpus, as they handcuff attempts to combat "the great engines of judicial despotism," THE FEDERALIST NO. 83, at 456 (Alexander Hamilton) (E.H. Scott ed. 1898).

Additionally, and more significant still, continued detention may be justified by a CSRT on the basis of evidence resulting from torture. Testimony procured by coercion is

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obtain evidence to support their claims that they are not enemies of the United States.

notoriously unreliable and unspeakably inhumane. *See generally* INTELLIGENCE SCIENCE BOARD, EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART (2006), *available at* http://www. fas.org/irp/dni/educing.pdf. This basic point has long been recognized by the common law, which "has regarded torture and its fruits with abhorrence for over 500 years." *A. v. Sec'y of State,* [2006] 2 A.C. 221 ¶ 51 (H.L.) (appeal taken from Eng.) (Bingham, L.); *see also Hamdan,* 126 S. Ct. at 2786; *Jackson v. Denno,* 378 U.S. 368, 386 (1964); *Proceedings Against Felton,* 3 Howell's St. Tr. 367, 3 71 (162 8) (Eng.); JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 73 (1977) ("Already in the fifteenth and sixteenth centuries, . . . the celebrated Renaissance 'panegyrists' of English law were . . . extolling the absence of torture in England.") (footnote omitted). The DTA implicitly endorses holding detainees on the basis of such evidence by including an anti-torture provision that applies only to future CSRTs. DTA § 1005(b)(2), 119 Stat. at 2741. Even for these future proceedings, however, the Secretary of Defense is required only to develop procedures to assess whether evidence obtained by torture is probative, not to require its exclusion. *Id.* § 1005(b)(1), 119 Stat. at 2741.

Even if the CSRT protocol were capable of assessing whether a detainee was unlawfully held and entitled to be released, it is not an adequate substitute for the habeas writ because this remedy is not guaranteed. Upon concluding that detention is unjustified, a habeas court "can only direct [the prisoner] to be discharged." *Bollman,* 8 U.S. (4 Cranch) at 136; *see also* 2 STORY, *supra,* § 1339. But neither the DTA nor the MCA require this, and a recent report studying CSRT records shows that when at least three detainees were found by CSRTs not to be enemy combatants, they were subjected to a second, and in one case a third, CSRT proceeding until they were finally found to be properly classified as enemy combatants. Mark Denbeaux et al., No-Hearing Hearings:

CSRT: The Modern Habeas Corpus?, at 37-39 (2006), http://law.shu.edu/news/ final_no_ hearing_hearings_report.pdf.

3.

Therefore, because Congress in enacting the MCA has revoked the privilege of the writ of habeas corpus where it would have issued under the common law in 1789, without providing an adequate alternative, the MCA is void unless Congress's action fits within the exception in the Suspension Clause: Congress may suspend the writ "when in Cases of Rebellion or Invasion the public Safety may require it." U. S. CONST. art. I, § 9, cl. 2. However, Congress has not invoked this power.

Suspension has been an exceedingly rare event in the history of the United States. On only four occasions has Congress seen fit to suspend the writ. These examples follow a clear pattern: Each suspension has made specific reference to a state of "Rebellion" or "Invasion" and each suspension was limited to the duration of that necessity. In 1863, recognizing "the present rebellion," Congress authorized President Lincoln during the Civil War "whenever, in his judgment, the public safety may require it, . . . to suspend the writ of habeas corpus." Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755. As a result, no writ was to issue "so long as said suspension by the President shall remain in force, and said rebellion continue." *Id.* In the Ku Klux Klan Act of 1871, Congress agreed to authorize suspension whenever "the unlawful combinations named [in the statute] shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State," finding that these circumstances "shall be deemed a rebellion against the government of the United States." Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 13, 14-15. Suspension was also authorized "when in cases of rebellion, insurrection, or invasion the public safety may require it" in

two territories of the United States: the Philippines, Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692, and Hawaii, Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 141, 153 (1900); *see Duncan v. Kahanamoku*, 327 U.S. 304, 307-08 (1946). *See also* DUKER, *supra*, at 149, 178 n.190.

Because the MCA contains neither of these hallmarks of suspension, and because there is no indication that Congress sought to avail itself of the exception in the Suspension Clause, its attempt to revoke federal jurisdiction that the Supreme Court held to exist exceeds the powers of Congress. The MCA therefore has no effect on the jurisdiction of the federal courts to consider these petitions and their related appeals.

II.

In *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), Judge Joyce Hens Green addressed eleven coordinated habeas cases involving 56 aliens being detained by the United States as "enemy combatants" at Guantanamo Bay, *id.* at 445. These detainees are citizens of friendly nations—Australia, Bahrain, Canada, Kuwait, Libya, Turkey, the United Kingdom, and Yemen—who were seized in Afghanistan, Bosnia and Herzegovina, The Gambia, Pakistan, Thailand, and Zambia. Each detainee maintains that he was wrongly classified as an "enemy combatant." Denying in part the government's motion to dismiss the petitions, the district court ruled:

> [T]he petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and . . . the procedures implemented by the government to confirm that the petitioners are "enemy combatants" subject to indefinite detention violate the petitioners' rights to due process of law.

Id. at 445. The district court further ruled that the Taliban but not the al Qaeda detainees were entitled to the protections of the Third and Fourth Geneva Conventions. *Id.* at 478-80.

In *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005), Judge Richard J. Leon considered the habeas petitions of five Algerian-Bosnian citizens and one Algerian citizen with permanent Bosnian residency. They were arrested by Bosnian police in 2001 on suspicion of plotting to attack the United States and British embassies in Sarajevo. After the Supreme Court of the Federation of Bosnia and Herzegovina ordered the six men to be released in January 2002,[11] they were seized by United States forces and transported to Guantanamo Bay. The *Khalid* decision also covers the separate case of a French citizen seized in Pakistan and transported to Guantanamo Bay. Rejecting the petitioners' claim that their detention is unjustified, the district court ruled that "no viable legal theory exists by which [the district court] could issue a writ of habeas corpus under" the circumstances presented, *id.* at 314, noting the President's powers under Article II, Congress's Authorization for the Use of Military Force ("AUMF"), and the Order on Detention (Nov. 13, 2001), *see id.* at 317-20. The district court granted the government's motion and dismissed the petitions. *Id.* at 316.

The fundamental question presented by a petition for a writ of habeas corpus is whether Executive detention is lawful. A far more difficult question is what serves to justify Executive detention under the law. At the margin, the precise constitutional bounds of Executive authority are unclear, *see Hamdan*, 126 S. Ct. at 2773-74; *id.* at 2786 (citing *Ex parte Quirin*, 317 U.S. 1, 28 (1942)), and the Executive detention at issue is the product of a unique situation in our history. Unlike the uniformed combat that is contemplated by the laws of war, *see generally* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920), the Geneva Conventions, *e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S.

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[11] *See* Supreme Court of the Federation of Bosnia and Herzegovina, Sarajevo, Jan. 17, 2003, Ki-1001/01.

135, and the Constitution, *see* U.S. CONST. art. I, § 8, cl. 11, the United States confronts a stateless enemy in the war on terror that is difficult to identify and widely dispersed. *See Hamdi*, 519 U. S. at 519-20.

The parties recite in their several briefs the substantial competing interests of individual liberty and national security that are at stake, much as did the Supreme Court in *Hamdi*, 542 U.S. at 529-32 (plurality opinion); *see id.* at 544-45 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment). In *Hamdi*, the plurality acknowledged that "core strategic matters of war-making belong in the hands of those who are best positioned and most politically accountable for making them." *Id.* at 531. At the same time, it acknowledged that for Hamdi "detention could last for the rest of his life." *Id.* at 520. Although Hamdi was a United States citizen, the premise underlying the conclusion that there is a role for the judiciary, *id.* at 532-33, was that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat," *id.* at 530. In short, the nature of the conflict makes true enemies of the United States more troublesome. At the same time, the risk of wrongful detention of mere bystanders is acute, particularly where, as here, the Executive detains individuals without trial.

Parsing the role of the judiciary in this context is arduous. The power of the President is at its zenith, after all, when the President acts in the conduct of foreign affairs with the support of Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Even assuming the AUMF and the Order on Detention provide such support for the detentions at issue, still the President's powers are not unlimited in wartime. *See, e.g., Milligan*, 71 U.S. (4 Wall.) at 125. The Founders could have granted plenary power to the President to confront emergency

situations, but they did not; they could have authorized the suspension of habeas corpus during any state of war, but they limited suspension to cases of "Rebellion or Invasion." U.S. CONST. art. I, § 9, cl. 2; *see* 2 STORY, *supra,* § 1342; *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra,* at 341 (proposal of Charles Pinckney). Even in 1627, at a time when "[a]ll justice still flowed from the king [and] the courts merely dispensed that justice," DUKER, *supra,* at 44, the idea that a court would remand a prisoner merely because the Crown so ordered ("*per speciale mandatum Domini Regis*") was deemed to be inconsistent with the notion of a government under law. *See Darnel's Case*, 3 Howell's St. Tr. 1, 59 (K.B. 1627); MEADOR, *supra,* at 13-19. While judgments of military necessity are entitled to deference by the courts and while temporary custody during wartime may be justified in order properly to process those who have been captured, the Executive has had ample opportunity during the past five years during which the detainees have been held at Guantanamo Bay to determine who is being held and for what reason. *See, e.g., Hamdan*, 126 S. Ct. at 2773; *cf. Hamdi*, 542 U.S. at 521.

Throughout history, courts reviewing the Executive detention of prisoners have engaged in searching factual review of the Executive's claims. In *Bollman*, the Supreme Court reviewed a petition of two alleged traitors accused of levying war against the United States. The petitioners were held in custody by the marshal but had not yet been charged. 8 U. S. (4 Cranch) at 75-76, 125. After the "testimony on which they were committed [was] fully examined and attentively considered," the Court ordered the prisoners released. *Id.* at 136-37. The 1759 English case of *Rex v. Schiever*, discussed *supra* Part I.C.1, also shows that habeas courts scrutinized the factual basis for the detention of even wartime prisoners. In *Schiever*, the court reviewed the prisoner's affidavit and took further testimony from a witness, who "sw[ore] that Schiever was forced against his inclination . . . to serve on board [the

French privateer]." 2 Burr. at 766, 97 Eng. Rep. at 551. Nonetheless, to the court it was clear that Schiever had, in fact, fought against England. As such, "the Court thought this man, upon his own shewing, clearly a prisoner of war and lawfully detained as such. Therefore they Denied the motion." *Id.*, 97 Eng. Rep. at 552 (footnote omitted). Similar themes and factual inquiry appear in *Three Spanish Sailors*, 2 Black. W. 1324, 96 Eng. Rep. 775, in which three alien petitioners submitted affidavits during wartime but failed to convince the court that they were not enemies of the Crown, and *Goldswain's Case*, 5 Black. W. 1207, 96 Eng. Rep. 711 (C.P. 1778), in which a wrongly impressed Englishman was released from service during wartime. *See also Beeching*, 4 B. & C. 137, 107 Eng. Rep. 1010.

In the early history of the United States, two cases further suggest that factual review accompanied even writs during wartime. In *United States v. Williams* (C.C.D. Va. Dec. 4, 1813), a previously unreported case researched for a recent essay in *The Green Bag*, Chief Justice John Marshall, riding circuit, released an enemy alien from detention by civil authorities. The Chief Justice concluded that "the regulations made by the President of the United States respecting alien enemies [did] not authorize the confinement of the petitioner in this case." Neuman & Hobson, *supra*, at 42 (quoting the circuit court's order book). A majority of the Supreme Court of Pennsylvania, in *Lockington's Case*, 1 Brightly's (N.P.) 269 (Pa. 1813), agreed that alien enemies were entitled to a judgment on the merits as to whether their detention was justified,[12] and thereafter remanded the prisoners. *Id.* at 283-84 (Tilghman, C.J.); *id.* at 285, 293 (Yeates, J.).

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[12] Prior to *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859), and *Tarble's Case*, 80 U.S. (13 Wall.) 397, 411-12 (1872), state courts regularly issued writs of habeas corpus as to federal prisoners.

The government maintains that a series of World War II-era cases undercuts the proposition that habeas review of uncharged detainees requires a factual assessment. It cites several cases in which courts have refused to engage in factual review of the findings of military tribunals imposing sentences under the laws of war. *See, e.g., Eisentrager*, 339 U.S. 763; *In re Yamashita*, 327 U.S. 1 (1945); *Quirin*, 317 U.S. at 25. There is good reason to treat differently a petition by an uncharged detainee—who could be held indefinitely without even the prospect of a trial or meaningful process—from that of a convicted war criminal. *See Rasul*, 542 U.S. at 476; *Omar v. Harvey*, No. 06-5126, slip op. at 13 (D.C. Cir. Feb. 9, 2007); *see also supra* note 9. For example, in *Yamashita*, the prisoner petitioned for a writ of habeas corpus only after a trial before a military tribunal where his six attorneys defended against 286 government witnesses. 327 U.S. at 5. *Quirin* involved a military commission, *see* 317 U.S. at 18-19, where the government presented "overwhelming" proof that included confessions from the German saboteurs. PIERCE O'DONNELL, IN TIME OF WAR 152-53, 165-66, 189 (2005). In *Eisentrager*, 339 U.S. at 766, the military tribunal conducted a trial lasting months. By contrast, the detainees have been charged with no crimes, nor are charges pending. The robustness of the review they have received to date differs by orders of magnitude from that of the military tribunal cases.[13]

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[13] There is also good reason to distinguish between these detainees' cases and parallel cases where detainees have been accorded prisoner-of-war status and the benefits of Army Regulation 190-8, which implements the Third Geneva Convention. These provisions contemplate the end of hostilities and prisoner exchanges, *id.* §§ 3-11, 3-13, and provide for more extensive process for determining the status of prisoners, *id.* § 1-6. The regulations further specify that:

> Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to deter-

The Supreme Court in *Rasul* did not address "whether and what further proceedings may become necessary after respondents make their responses to the merits of petitioners' claims," 542 U.S. at 485. The detainees cannot rest on due process under the Fifth Amendment. Although the district court in *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 454, made a contrary ruling, the Supreme Court in *Eisentrager* held that the Constitution does not afford rights to aliens in this context. 339 U.S. at 770; *accord Verdugo-Urquidez*, 494 U.S. at 269. Although in *Rasul* the Court cast doubt on the continuing vitality of *Eisentrager*, 542 U. S. at 475-79, absent an explicit statement by the Court that it intended to overrule *Eisentrager*'s constitutional holding, that holding is binding on this court. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); Op. at 21. Rather, the process that is due inheres in the nature of the writ and the inquiry it entails. The Court in *Rasul* held that federal court jurisdiction under 28 U.S.C. § 2241 is permitted for habeas petitions filed by detainees at Guantanamo, 542 U. S. at 485; *id.* at 488 (Kennedy, J., concurring in the judgment), and this

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> mine what acts they have committed and what penalty should be imposed. The record of every Tribunal proceeding resulting in a determination denying [Enemy Prisoner of War] status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

Id. § 1-6g. In *Hamdi*, the Supreme Court recognized that it was conceivable that procedures similar to Army Regulation 190-8 may suffice to provide due process to a citizen-detainee. 542 U.S. at 538 (plurality opinion); *id.* at 550-51 (Souter, J., with whom Ginsburg, J., joins, concurring in part, dissenting in part, and concurring in the judgment). Even assuming that according Guantanamo detainees rights under Army Regulation 190-8 would provide adequate and independent factual review of their claims sufficient to satisfy the dictates of habeas corpus, as well as any treaty obligations that the detainees are able to enforce, the Executive has declined to accord such detainees prisoner-of-war status, *see, e.g.*, The President's News Conference With Chairman Hamid Karzai of the Afghan Interim Authority, 1 PUB. PAPERS 121, 123 (Jan. 28, 2002).

result is undisturbed because the MCA is void. So long as the Executive can convince an independent Article III habeas judge that it has not acted unlawfully, it may continue to detain those alien enemy combatants who pose a continuing threat during the active engagement of the United States in the war on terror. *See id.* at 488 (Kennedy, J., concurring in the judgment); *cf. Hamdi*, 542 U. S. at 518-19. But it must make that showing and the detainees must be allowed a meaningful opportunity to respond. *See* MEADOR, *supra*, at 18; *see also Hamdi*, 542 U.S. at 525-26.

Therefore, I would hold that on remand the district courts shall follow the return and traverse procedures of 28 U.S.C. § 2241 *et seq.* In particular, upon application for a writ of habeas corpus, 28 U.S.C. § 2242, the district court shall issue an order to show cause, whereupon "[t]he person to whom the writ is or order is directed shall make a return certifying the true cause of the detention," *id.* § 2243. So long as the government "puts forth credible evidence that the [detainee] meets the enemy-combatant criteria," *Hamdi*, 542 U.S. at 533, the district court must accept the return as true "if not traversed" by the person detained. *Id.* § 2248. The district court may take evidence "orally or by deposition, or, in the discretion of the judge, by affidavit." *Id.* § 2246. The district court may conduct discovery. *See Harris*, 394 U.S. at 298-99; *cf.* Rules Governing Section 2254 Cases, R. 6-8; Rules Governing Section 2255 Cases, R. 6-8. Thereafter, "[t]he [district] court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."[14]

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[14] Because the Suspension Clause question must be decided by the Supreme Court in the detainees' favor in order for the district court proceedings to occur, I leave for another day questions relating to the evolving and unlimited definition of "enemy combatant," *see Guantanamo Detainee Cases*, 355 F. Supp. 2d at 474-75, a detainee's inability to rebut evidence withheld on national security grounds, *see id.* at 468-72, as well as the detainees' claims under other statutes, international conventions, and treaties, and whether challenges to the conditions of confinement are

District courts are well able to adjust these proceedings in light of the government's significant interests in guarding national security, as suggested in *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 467, by use of protective orders and ex parte and in camera review, *id.* at 471. The procedural mechanisms employed in that case, *see, e.g., id.* at 452 & n.12, should be employed again, as district courts must assure the basic fairness of the habeas proceedings, *see generally id.* at 468-78.

Accordingly, I respectfully dissent from the judgment vacating the district courts' decisions and dismissing these appeals for lack of jurisdiction.

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cognizable in habeas. *Compare Khalid*, 355 F. Supp. 2d at 324-25, *with Miller v. Overholser*, 206 F.2d 415, 419-21 (D.C. Cir. 1953). Congressional action may also clarify matters. *See, e.g.*, S. 185, S. 576, 110th Cong. (2007).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed On: March 10, 2005]

No. 05-8003
September Term, 2004

02cv1130 02cv0299 02cv0828 04cv1227 04cv1254
04cv1135 04cv1136 04cv1137 04cv1144 04cv1164
04cv1194

In re: Guantanamo Detainee Cases,
~~05-5064~~
02cv00828

KHALED A. F. AL ODAH, Next Friend of Fawzi Khalid Abdullah Fahad Al Odah, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

BEFORE: Sentelle, Garland, and Roberts, *Circuit Judges*.

ORDER

Upon consideration of the petition for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and motion to expedite appeal filed in No. 05-8003, the joint answer and cross-petition, and the reply, it is

ORDERED that the petition and cross-petition be granted. *See* 28 U.S.C. § 1292(b). Approval of the petition and cross-

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petition is without prejudice to reconsideration by the merits panel to which this appeal is assigned. It is

FURTHER ORDERED that the motion to expedite be granted and that the following briefing schedule and format apply:

Joint Opening Brief for Appellants—April 13, 2005
(not to exceed 14,000 words)

Joint Appendix—April 13, 2005

Joint Brief for Appellees/Cross-Appellants—May 13, 2005
(not to exceed 14,000 words)

Joint Answering and Reply Brief—June 13, 2005 for Appellants/Cross-Appellees
(not to exceed 14,000 words)

Reply Brief for Cross-Appellants—June 28, 2005
(not to exceed 7,000 words)

Any amici curiae are to file their briefs on the same date as the party they support, and aligned amici must file jointly to the extent possible. *See* D.C. Cir. Rule 29(d).

The Clerk is directed to schedule this case, which will be assigned a general docket number upon payment of the docketing and filing fees, for oral argument on the first appropriate date after the conclusion of briefing and on the same day, and before the same panel, as No. 05-5062, et al., *Boumediene v. Bush*.

The Clerk is directed to transmit a certified copy of this order to the district court. With respect to the petition and cross-petition for interlocutory review in No. 05-8003, the district court is directed to file two copies of the order as separate notices of appeal pursuant to Fed. R. App. P. 5 and to collect the mandatory docketing and filing fees from counsel. Upon payment of the fees, the district court is to

certify and transmit the preliminary record to this court, after which the cases will be assigned general docket numbers and consolidated with one another. After those general docket numbers have been assigned, No. 05-5064 will be consolidated with those consolidated cases. The parties in all three cases will be required to comply with the briefing schedule and format established by this order.

Per Curiam

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action Nos.
02-CV-0299 (CKK), 02-CV-0828 (CKK),
02-CV-1130 (CKK), 04-CV-1135 (ESH),
04-CV-1136 (JDB), 04-CV-1137 (RMC),
04-CV-1144 (RWR), 04-CV-1164 (RBW)
04-CV-1194 (HHK), 04-CV-1227 (RBW),
04-CV-1254 (HHK)

In re Guantanamo Detainee Cases

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION FOR CERTIFICATION OF JANUARY 31, 2005 ORDERS AND FOR STAY

Upon consideration of respondents' Motion for Certification of January 31, 2005 Interlocutory Orders for Appeal Pursuant to 28 U.S.C. § 1292(b) and to Stay Proceedings Pending Appeal, it is hereby

ORDERED that the respondents' motion is granted in part and denied in part. It is

FURTHER ORDERED that the Court finds that its January 31, 2005 Order (and Memorandum Opinion) Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law and Requesting Briefing on the Future Proceedings in These Cases (hereinafter "Order on Motion to Dismiss") involves controlling questions of law as to which there is substantial ground for difference of opinion, such as whether petitioners possess

enforceable rights under the Fifth Amendment to the United States Constitution; whether assuming arguendo that petitioners possess such rights, the Combatant Status Review Tribunals comport with those rights; and whether certain of the petitioners possess rights under the Third Geneva Convention that are judicially enforceable. It is

FURTHER ORDERED that the Court does not find that the Court's January 31, 2005 Order Granting November 18, 2004 Motion for Access to Unredacted Factual Returns (hereinafter "Order on Discovery Motion") involves controlling questions of law to which there is substantial ground for difference of opinion. It is

FURTHER ORDERED that the Court finds that an immediate appeal of the Order on Motion to Dismiss but not of the Order on Discovery Motion may materially advance the ultimate termination of this litigation. It is

FURTHER ORDERED that the Order on Motion to Dismiss is hereby CERTIFIED for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). It is

FURTHER ORDERED that, pursuant to 28 U.S.C. § 1292(b), the Order on Motion to Dismiss shall be deemed amended to include and reflect the findings in this Order. It is

FURTHER ORDERED that the respondents' request for certification of the Order on Discovery Motion is denied. It is

FURTHER ORDERED that the proceedings in the eleven above-captioned cases are stayed for all purposes pending resolution of all appeals in this matter. The stay for "all purposes" includes a stay of the resolution of the respondents' motions to dismiss the claims of petitioners who have been transferred out of the custody of the United States.

It shall be up to the individual Judges assigned to the other Guantanamo detainee cases not contained in the above cap

tion to determine whether stays should be granted in those cases. **IT IS SO ORDERED**.

February 3, 2005

_____/s/_____
JOYCE HENS GREEN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action Nos.
02-CV-0299 (CKK), 02-CV-0828 (CKK),
02-CV-1130 (CKK), 04-CV-1135 (ESH),
04-CV-1136 (JDB), 04-CV-1137 (RMC),
04-CV-1144 (RWR), 04-CV-1164 (RBW),
04-CV-1194 (HHK), 04-CV-1227 (RBW),
04-CV-1254 (HHK)

In re Guantanamo Detainee Cases

MEMORANDUM OPINION DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW

These eleven coordinated *habeas* cases were filed by de tainees held as "enemy combatants" at the United States Naval Base at Guantanamo Bay, Cuba. Presently pending is the government's motion to dismiss or for judgment as a matter of law regarding all claims filed by all petitioners, including claims based on the United States Constitution, treaties, statutes, regulations, the common law, and customary international law. Counsel filed numerous briefs addressing issues raised in the motion and argued their positions at a hearing in early December 2004. Upon consideration of all filings submitted in these cases and the arguments made at the hearing, and for the reasons stated below, the Court concludes that the petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and that the procedures implemented by the government to confirm that the petitioners are "enemy combatants" subject to indefinite

detention violate the petitioners' rights to due process of law. The Court also holds that at least some of the petitioners have stated valid claims under the Third Geneva Convention. Finally, the Court holds that the government is entitled to the dismissal of the petitioners' remaining claims.

Because this Memorandum Opinion references classified material, it is being issued in two versions. The official version is unredacted and is being filed with the Court Security Officer at the U.S. Department of Justice responsible for the management of classified information in these cases. The Court Security Officer will maintain possession of the original, distribute copies to counsel with the appropriate security clearances in accordance with the procedures earlier established in these cases, and ensure that the document is transmitted to the Court of Appeals should an appeal be taken. Classified information in the official version is highlighted in gray to alert the reader to the specific material that may not be released to the public. The other version of the Memorandum Opinion contains redactions of all classified. information and, in an abundance of caution, portions of any discussions that might lead to the discovery of classified information. The redacted version is being posted in the electronic dockets of the cases and is available for public review.

I. BACKGROUND

In response to the horrific and unprecedented terrorist attacks by al Qaeda against the United States of America on September 11, 2001, Congress passed a joint resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . , or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (hereinafter

"AUMF"). In accordance with the AUMF, President George W. Bush ordered the commencement of military operations in Afghanistan against al Qaeda and the Taliban regime, which, harbored the terrorist organization. During the course of the military campaign, United States forces took custody of numerous individuals who were actively fighting against allied forces on Afghan soil. Many of these individuals were deemed by military authorities to be "enemy combatants" and, beginning in early 2002, were transferred to facilities at the United States Naval Base at Guantanamo Bay, Cuba, where they continue to be detained by U.S. authorities.

In addition to belligerents captured during the heat of war in Afghanistan, the U.S. authorities are also detaining at Guantanamo Bay pursuant to the AUMF numerous individuals who were captured hundreds or thousands of miles from a battle zone in the traditional sense of that term. For example, detainees at Guantanamo Bay who are presently seeking *habeas* relief in the United States District Court for the District of Columbia include men who were taken into custody as far away from Afghanistan as Gambia,[1] Zambia,[2] Bosnia,[3] and Thailand.[4] Some have already been detained as long as three years[5] while others have been captured as recently as September 2004.[6] Although many of these individuals may never have been close to an actual battlefield and may never have raised conventional arms against the United States or its

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[1] Jamil El-Banna and Bisher Al-Rawi, petitioners in *El-Banna v. Bush*, 04-CV-1144 (RWR).

[2] Martin Mubanga, petitioner in *El-Banna v. Bush*, 04-CV-1144 (RWR).

[3] Lakhdar Boumediene, Mohammed Nechle, Hadj Boudella, Belkacem Bensayah, Mustafa Ait Idr, and Saber Lahmar, petitioners in *Boumediene v. Bush*, 04-CV-1166 (RJL).

[4] Saifullah Paracha, petitioner in *Paracha v. Bush*, 04-CV-2022 (PLF).

[5] *E.g.*, the petitioners in *Al Odah v. Bush*, 02-CV-0828 (CKK).

[6] *E.g.*, Saifullah Paracha in *Paracha v. Bush*, 04-CV-2022 (PLF).

allies, the military nonetheless has deemed them detainable as "enemy combatants" based on conclusions that they have ties to al Qaeda or other terrorist organizations.

All of the individuals who have been detained at Guantanamo Bay have been categorized to fall within a general class of people the administration calls "enemy combatants." It is the government's position that once someone has been properly designated as such, that person can be held indefinitely until the end of America's war on terrorism or until the military determines on a case by case basis that the particular detainee no longer poses a threat to the United States or its allies. Within the general set of "enemy combatants" is a subset of individuals whom the administration decided to prosecute for war crimes before a military commission established pursuant to a Military Order issued by President Bush on November 13, 2001. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). Should individuals be prosecuted and convicted in accordance with the Military Order, they would be subject to sentences with fixed terms of incarceration or other specific penalties.

Since the beginning of the military's detention operations at Guantanamo Bay in early 2002, detainees subject to criminal prosecution have been bestowed with more rights than detainees whom the military did not intend to prosecute formally for war crimes. For example, the military regulations governing the prosecutions of detainees required a formal notice of charges, a presumption of innocence of any crime until proven guilty, a right to counsel, pretrial disclosure to the defense team of exculpatory evidence and of evidence the prosecution intends to use at trial, the right to call reasonably available witnesses, the right to have defense counsel cross-examine prosecution witnesses, the right to have defense counsel attend every portion of the trial proceedings even where classified information is presented, and the right to an

open trial with the press present, at least for those portions not involving classified information. *See* Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. §§ 9.1 *et seq.* (2005). Although detainees at Guantanamo Bay not subject to prosecution could suffer the same fate as those convicted of war crimes—potentially life in prison, depending on how long America's war on terrorism lasts—they were not given any significant procedural rights to challenge their status as alleged "enemy combatants," at least until relatively recently. From the beginning of 2002 through at least June 2004, the substantial majority of detainees not charged with war crimes were not informed of the bases upon which they were detained, were not permitted access to counsel, were not given a formal opportunity to challenge their "enemy combatant" status, and were alleged to be held virtually *incommunicado* from the outside world. Whether those individuals deemed "enemy combatants" are entitled under the United States Constitution and other laws to any rights and, if so, the scope of those rights is the focus of the government's motion to dismiss and this Memorandum Opinion.[7]

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[7] In a decision issued on November 8, 2004, Judge James Robertson ruled that the procedures for trying Guantanamo detainees for alleged war crimes by military commission were unlawful for failing to comply with the requirements for courts martial set forth in the Uniform Code of Military Justice. *Hamdan v. Rumsfeld*, 344 F. Supp.2d 152 (D.D.C. 2004). Only one of the detainees in the above-captioned cases has been given notice that he will be tried for war crimes. That detainee, David Hicks, a petitioner in *Hicks v. Bush*, 02-CV-0299 (CKK), has filed a separate motion for partial summary judgment challenging the legality of the military commission procedures. Pursuant to an order issued in that case on December 15, 2004, resolution of that motion is being held in abeyance pending final resolution of all appeals in *Hamdan*. This Memorandum Opinion does not address the legality of the military commission proceedings but rather focuses on the issue of the rights of detainees with respect to their classification as "enemy combatants" regardless of whether they have been formally charged with a war crime.

The first of these coordinated cases challenging the legality of the detention of alleged "enemy combatants" at Guantanamo Bay and the terms and conditions of that detention commenced nearly three years ago on February 19,2002. *Rasul v. Bush*, 02-CV-0299 (CKK). The action, brought by relatives on behalf of one Australian and two British nationals as their "next friends,"[8] was styled as a petition for writ of *habeas corpus* pursuant to 28 U.S.C. §§ 2241 and 2242. The initial relief sought included an order requiring the release of the detainees, an order permitting counsel to meet with the detainees in private and without government monitoring, and an order directing the cessation of interrogations of the detainees during the pendency of litigation. The asserted substantive bases for the requested relief ultimately included the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, and customary international law.

Less than three months after the commencement of *Rasul*, the second of these coordinated cases was filed. *Al Odah v. Bush*, 02-CV-0828 (CKK). The individuals filing suit on behalf of the twelve Kuwaiti detainees in that case did not expressly request release from custody but rather sought judicial enforcement of the detainees' asserted rights to meet with family members, be informed of any charges against them, and have access to the courts or some other impartial tribunal to exonerate themselves of any wrongdoing. The alleged bases for these rights included the Fifth Amendment to the United States Constitution, the Alien Tort Claims Act, and the Administrative Procedure Act.

The government filed a motion to dismiss the two cases, arguing that both of them should be classified as *habeas*

[8] 28 U.S.C. § 2242 provides that a *habeas* petition may be brought "by the person for whose relief it is intended or by someone acting in his behalf."

actions and asserting that because all of the detainees were aliens being held outside the sovereign territory of the United States, the District Court should dismiss the actions for lack of jurisdiction to hear their claims. The government's motion relied heavily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a Supreme Court case involving German nationals convicted by a United States military commission sitting in China for acts committed in China after Germany's surrender in World War II. The German nationals were eventually incarcerated in Landsberg prison in Germany and sought *habeas* relief, claiming their trial, conviction, and imprisonment violated Articles I and III of the United States Constitution, the Fifth Amendment, other laws of the United States, and the Geneva Convention governing the treatment of prisoners of war. The Supreme Court ultimately held that the petitioners in *Eisentrager* had no standing to file a claim for *habeas* relief in a United States court.

In a thoughtful analysis of *Eisentrager* and its progeny, Judge Colleen Kollar-Kotelly granted the government's motion to dismiss both cases. *Rasul v. Bush*, 215 F. Supp.2d 55 (D.D.C. 2002). The decision was based on an interpretation that *Eisentrager* barred claims of any alien seeking to enforce the United States Constitution in a *habeas* proceeding unless the alien is in custody in sovereign United States territory. *Id.* at 68. Recognizing that Guantanamo Bay is not part of the sovereign territory of the United States, *id.* at 69, the District Court dismissed the cases for lack of "jurisdiction to consider the constitutional claims that are presented to the Court for resolution." *Id.* at 73. After issuing a show cause order as to why an additional pending *habeas* case filed by a Guantanamo detainee, *Habib v. Bush*, 02-CV-1130 (CKK), should not be dismissed in light of the decision in *Rasul* and *Al Odah*, the District Court also dismissed that case, and all three cases were appealed to the United States Court of Appeals for the District of Columbia Circuit.

On appeal, the D.C. Circuit affirmed the District Court's decisions in all three cases. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). Reviewing recent precedent involving aliens and constitutional rights, the Court of Appeals announced, "The law of the circuit now is that a 'foreign entity without property or pı sence in this country has no constitutional rights, under the due process clause or otherwise.'" *Id.* at 1141 (*citing People's Mojahedin Org. v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) and *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002)). "The consequence," the court continued, "is that no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States." *Id.* at 1141.

The Supreme Court reversed the D.C. Circuit's decision and held that the District Court did have jurisdiction to hear the detainees' habeas claims. *Rasul v. Bush*, ___ U.S. ___, 124 S. Ct. 2686 (2004). The majority opinion, issued June 28, 2004, noted several facts that distinguished the Guantanamo detainees from the petitioners in *Eisentrager* more than fifty years earlier:

> [The Guantanamo petitioners] are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

124 S. Ct. at 2693. Emphasizing that "[b]y the express terms of its agreements with Cuba, the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base," and highlighting that the government conceded

at oral argument that "the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base," the Court concluded, "Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under [the *habeas* statute]." 124 S. Ct. at 2696.

The Supreme Court expressly acknowledged that the allegations contained in the petitions for writs of *habeas corpus* "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States" as required by the *habeas* statute, 124 S. Ct. at 2698 n.15 (*quoting* 28 U.S.C. § 2241(c)(3)), and concluded by instructing:

> Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims.

124 S. Ct. at 2699.

On July 7, 2004, nine days after the issuance of the *Rasul* decision, Deputy Secretary of Defense Paul Wolfowitz issued an Order creating a military tribunal called the Combatant Status Review Tribunal (hereinafter "CSRT") to review the status of each detainee at Guantanamo Bay as an "enemy combatant."[9] It appears that this is the first formal document

[9] The document is attached as Exhibit A to the respondents' motion to dismiss and can also be found at http://www.defenselink.millnews/Jul2004/d20040707review.pdf.

to officially define the term "enemy combatant" as used by the respondents. That definition is as follows:

> [T]he term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

The Deputy Secretary's Order notes that all Guantanamo detainees were previously determined to be "enemy combatants" through what the Order describes without additional specificity as "multiple levels of review by officers of the Department of Defense." Order at 1. The Order sets forth procedures by which detainees can contest this status before a panel of three commissioned military officers.

The CSRT procedures will be described in more detail below, but in brief, under the terms of the July 7 Order and a July 29, 2004 Memorandum issued by Secretary of the Navy Gordon England implementing the Order,[10] detainees for the first time have the right to hear the factual bases for their detention, at least to the extent that those facts do not involve information deemed classified by the administration. Detainees also have the right to testify why they contend they should not be considered "enemy combatants" and may present additional evidence they believe might exculpate them, at least to the extent the tribunal finds such evidence relevant and "reasonably available." The detainees do not have a right to counsel in the proceedings, although each is assigned a military officer who serves as a "Personal Representative" to assist the detainee in understanding the process and pre-

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[10] The Implementing Memorandum is attached as Exhibit B to the motion to dismiss and can also be found at http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

senting his case. Formal rules of evidence do not apply, and there is a presumption in favor of the government's conclusion that a detainee is in fact an "enemy combatant." Although the tribunal is free to consider classified evidence supporting a contention that an individual is an "enemy combatant," that individual is not entitled to have access to or know the details of that classed evidence.

The record of the CSRT proceedings, including the tribunal's decision regarding "enemy combatant" status, is reviewed for legal sufficiency by the Staff Judge Advocate for the Convening Authority, the body designated by the Secretary of the Navy to appoint tribunal members and Personal Representatives. After that review, the Staff Judge Advocate makes a recommendation to the Convening Authority, which is then required either to approve the panel's decision or to send the decision back to the panel for further proceedings. It is the government's position that in the event a conclusion by the tribunal that a detainee is an "enemy combatant" is affirmed, it is legal to hold the detainee in custody until the war on terrorism has been declared by the President to have concluded or until the President or his designees have determined that the detainee is no longer a threat to national security. If the tribunal finally determines that a detainee should no longer be deemed an "enemy combatant," a written report of the decision is forwarded to the Secretary of Defense or his designee, who is then obligated to contact the Secretary of State for coordination of the transfer of the detainee either to his country of citizenship or elsewhere in accordance with law and U.S. foreign policy.

In the wake of the Supreme Court's decision in *Rasul*, several new *habeas* cases were filed on behalf of Guantanamo detainees in addition to those cases that were remanded by the Court as part of *Rasul*. As of the end of July 2004, thirteen cases involving more than sixty detainees were pending before eight Judges in this District Court. On July 23,

2004, the respondents filed a motion to consolidate all of the cases pending at that time. The motion was denied without prejudice three days later. On August 4, 2004, the respondents filed a motion seeking coordination of legal issues common to all cases. By order dated August 17, 2004, Judge Gladys Kessler on behalf of the Calendar and Case Management Committee granted the motion in part, designating this Judge to coordinate and manage all proceedings in the pending matters and, to the extent necessary, rule on procedural and substantive issues common to the cases. An Executive Session Resolution dated September 15, 2004 further clarified that this Judge would identify and delineate both procedural and substantive issues common to all or some of these cases and, as consented to by the transferring judge in each case, rule on common procedural issues. The Resolution also provided that to the extent additional consent was given by the transferring Judges, this Judge would address specified common substantive issues. The Resolution concluded by stating that any Judge who did not agree with any substantive decision made by this Judge could resolve the issue in his or her own case as he or she deemed appropriate. Although issues and motions were transferred to this Judge, the cases themselves have remained before the assigned Judges.

After two informal status conferences discussing, among other issues, the factual bases for the government's detention of the petitioners, this Judge issued a scheduling order requiring the respondents to file responsive pleadings showing cause why writs of *habeas corpus* and the relief sought by petitioners should not be granted. The order also incorporated the respondent proposed schedule for the filing of factual returns identifying the specific bases upon which they claim the government is entitled to detain each petitioner at Guantanamo Bay as an "enemy combatant." Although most of the detainees had already been held as "enemy combatants" for more than two years and had been subjected to unspecified

"multiple levels of review," the respondents chose to submit as factual support for their detention of the petitioners the record from the CSRT proceedings, which had only commenced in late August or early September 2004. Those factual returns were filed with the Court on a rolling basis as the CSRT proceedings were completed, with the earliest submitted on September 17, 2004 and the latest on December 30, 2004. Because every complete CSRT record contained classified information, respondents filed redacted, unclassified versions on the public record, submitted the full, classified versions for the Court's *in camera* review, and served on counsel for the petitioners with appropriate security clearances versions containing most of the classified information disclosed in the Court's copies but redacting some classified information that respondents alleged would not exculpate the detainees from their "enemy combatant" status.

During the fall, the Court resolved numerous procedural issues common to all cases. Among other matters, the Court ruled that the cases should not be transferred to the Eastern District of Virginia, where the primary respondent, Secretary of Defense Donald Rumsfeld, maintains his office,[11] ruled on protective order issues,[12] and granted the petitioners certain rights relating to access to counsel to assist in the litigation of these cases.[13]

On October 4, 2004, the respondents filed their Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law in all thirteen cases pending before the Court at that time. Counsel for petitioners filed a joint opposition on November 5, 2004, which was supplemented by additional filings specific to the petitions

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[11] *Gherebi v. Bush*, 338 F. Supp.2d 91 (D.D.C. 2004).

[12] November 8, 2004 Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 344 F. Supp.2d 174 (D.D.C. 2004).

[13] *Id.*

filed in *Al Odah v. United States*, 02-CV-0828 (CKK); *El-Banna v. Bush*, 04-CV-1144 (RWR); and *Bournediene v. Bush*, 04-CV-1166 (RJL). Respondents filed replies in support of their original motion. The motions to dismiss in eleven of the thirteen cases were transferred by separate orders issued by the assigned Judges in accordance with the procedures set forth for the resolution of substantive matters in the September 15, 2004 Executive Resolution.[14] This Court hold oral argument for the eleven cases with transferred motions on December 1, 2004. Subsequently, eight more *habeas* cases were filed on behalf of Guantanamo detainees.[15] Although this Memorandum Opinion addresses issues common to those new cases, counsel in those cases have not yet had the opportunity to fully brief or argue the issues on their own behalf. Accordingly, while the Judges assigned to those cases are free, of course, to adopt the reasoning contained in this Memorandum Opinion in resolving those motions, this Memorandum Opinion technically applies only to the eleven cases contained in the above caption.

II. ANALYSIS

The petitioners in these eleven cases allege that the detention at Guantanamo Bay and the conditions thereof violate a variety of laws. All petitions assert violations of the Fifth Amendment, and a majority claim violations of the Alien Tort Claims Act,[16] the Administrative Procedure Act,[17] and

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[14] As was his prerogative, Judge Richard Leon did not transfer the motions to dismiss in his two Guantanamo cases, *Khalid v. Bush*, 04-CV-1142 (RJL) and *Boumediene v. Bush*, 04CV-1166 (RJL), and this Memorandum Opinion therefore does not apply to those two cases.

[15] *Belmar v. Bush*, 04-CV-1897 (RMC); *Al Qosi v. Bush*, 04-CV-1937 (PLF); *Paracha v. Bush*, 04-CV-2022 (PLF); *Al-Marri v. Bush*, 04-CV-2035 (GK); *Zemiri v. Bush*, 04-CV-2046 (CKK); *Deghayes v. Bush*, 04-CV-2215 (RMC); *Mustapha v. Bush*, 05-CV-0022 (JR); and *Abdullah v. Bush*, 05-CV-0023 (RWR).

[16] 28 U.S.C. § 1350 (1993).

the Geneva Conventions.[18] In addition, certain petitions allege violations of the Sixth, Eighth, and Fourteenth Amendments; the War Powers Clause;[19] the Suspension Clause;[20] Army Regulation 190-8, entitled "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees;" the International Covenant on Civil and Political Rights ("ICCPR");[21] the American Declaration on the Rights and Duties of Man ("ADRDM");[22] the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;[23] the International Labour Organization's Convention 182, Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour;[24] and customary international law. The respondents contend that none of these provisions constitutes a valid basis for any of the petitioners' claims and seek dismissal of all counts as a matter of law under Fed. R. Civ. P. 12(b)(6) for failing to state a claim upon which relief can be granted. In the alternative, the respondents seek a judgment based on the pleadings pursuant to Fed. R. Civ. P. 12(c). The respondents have not requested entry of summary judgment pursuant to Fed. R. Civ. P. 56, and they have opposed requests for discovery made by counsel for the petitioners on the ground that those requests are premature at this stage of the proceedings. *See, e.g.*, Respondents' Memo-

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[17] 5 U.S.C. §§ 555, 702, 706 (1996).

[18] (Third) Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 6 U.S.T. 3316; and Fourth Geneva Convention, 1956 WL 54810 (U.S. Treaty), T.I.A.S. No. 3365, 6 U.S.T. 3516.

[19] U.S. Const. art. I, § 8, cl. 11.

[20] U.S. Const. art. I, § 9, cl. 2.

[21] 999 U.N.T.S. 171, 6 I.L.M. 368 (1992), and 102d Cong., 138 Cong. Rec. S4781 (Apr. 2, 1992).

[22] O.A.S. Off. Rec. OEA/Ser. LV/I.4 Rev. (1965).

[23] S. Treaty Doc. No. 106-37, 2000 WL 33366017.

[24] S. Treaty Doc. No. 106-5, 1999 WL 33292717.

randum in Opposition to Petitioners' Motion for Leave to Take Discovery and For Preservation Order, filed January 12, 2005, at 6.

In addressing a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), the Court must accept as true all factual allegations contained in a petition and must resolve every factual inference in the petitioner's favor. *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000). The moving party is entitled to dismissal "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Croixland Properties Ltd. Partnership v. Corcoran*, 174 F.3d 213, 215 (D.C. Cir. 1999) (*quoting Hishon v. King & Spalding*, 467 U.S. 69 (1984)). Similarly, in resolving a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), the Court must "accept as true the allegations in the opponent's pleadings, and as false all controverted assertions of the movant" and must "accord the benefit of all reasonable inferences to the non-moving party." *Haynesworth v. Miller*, 820 F.2d 1245, 1249 n.11 (D.C. Cir. 1987).

A. EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION TO ALIENS

Notwithstanding the Supreme Court's decision in *Rasul* that the District Court's dismissal of the petitioners' claims was incorrect as a matter of law, the respondents argue in their October 2004 motion that the *Rasul* decision resolved only whether individuals detained at Guantanamo Bay had the right merely to *allege* in a United States District Court under the *habeas* statute that they are being detained in violation of the Constitution and other laws. Respondents argue that the decision was silent on the issue of whether the detainees actually *possess* any underlying substantive rights, and they further contend that earlier Supreme Court precedent and the law of this Circuit make clear that the detainees do

not hold any such substantive rights. Accordingly, it is the respondents' position that although *Rasul* clarified that a detainee has every right to file papers in the Clerk's Office alleging violations of the Constitution, statutes, treaties and other laws, and although the Court has jurisdiction to accept the filing and to consider those papers, the Court must not permit the case to proceed beyond a declaration that no underlying substantive rights exist. While the Court would have welcomed a clearer declaration in the *Rasul* opinion regarding the specific constitutional and other substantive rights of the petitioners, it does not interpret the Supreme Court's decision as narrowly as the respondents suggest it should. To the contrary, the Court interprets *Rasul*, in conjunction with other precedent, to require the recognition that the detainees at Guantanamo Bay possess enforceable constitutional rights.

The significance and scope of the *Rasul* decision is best understood after a review of earlier case law addressing the applicability of the Constitution outside of the United States and to individuals who are not American citizens. At the end of the nineteenth century, the Supreme Court interpreted the Constitution to have no applicability outside of the United States, even to activities undertaken by the United States government with respect to American citizens. In *Ross v. McIntyre*, 140 U.S. 453, 464 (1891), a *habeas* case involving a U.S. citizen convicted of murder by an American consular tribunal in Japan, the Court declared, "By the constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. The guaranties it affords . . . apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. The constitution can have no operation in another country." 140 U.S. at 464 (*citing Cook v. United States* 138 U.S. 157, 181 (1891)).

The Supreme Court reexamined this broad declaration beginning a decade later and recognized the potential for a more liberal view of the Constitution's applicability outside of the United States in a line of precedent known as the "Insular Cases." One of the earliest of those cases, *Downes v. Bidwell*, 182 U.S. 244 (1901), addressed whether the imposition of duties on products from Puerto Rico after it became a U.S. territory was a violation of the Constitution's Uniformity Clause, which requires that "all duties, imposts, and excises shall be uniform throughout the United States." Art. I, § 8, cl. 2. As part of its analysis, the Court held that the "unincorporated" territory of Puerto Rico—meaning a territory not destined for statehood—was not part of the "United States" and that, as a result, the imposition of duties on Puerto Rican goods did not violate the Constitution. In dicta, the Court acknowledged that Congress had traditionally interpreted the Constitution to apply to territories "only when and so far as Congress shall so direct." 182 U.S. at 278-79. The Court noted the apprehension of "many eminent men" caused by such an interpretation, however, and it described that concern as "a fear lest an unrestrained possession of power on the part of Congress may lead to unjust and oppressive legislation in which the natural rights of territories, or their inhabitants, may be engulfed in a centralized despotism." *Id.* at 280. Significant to the resolution of the cases brought by the Guantanamo detainees, the Court went on to minimize such concern by suggesting that the Constitution prevented Congress from denying inhabitants of unincorporated U.S. territories certain "fundamental" rights, including "the right to personal liberty . . . ; to free access to courts of justice, [and] to due process of law." *Id.* at 282. Because such fundamental rights were not at issue in *Downes v. Bidwell*, the Court did not address this concept in greater detail at that time.

Three years later, the Court faced more directly the applicability of the Constitution outside of the United States when it resolved whether the defendant in a criminal libel

action in a Philippines court was entitled to a trial by jury under Article III and the Sixth Amendment of the U.S. Constitution. *Dorr v. United States*, 195 U.S. 138 (1904). At the time of the litigation, the United States had control of the Philippines as an unincorporated territory after the conclusion of the Spanish-American War. Congress, however, had enacted legislation expressly exempting application of the U.S. Constitution to the area. The defendant in that case was prosecuted for libel under the previously existing Spanish system and was not permitted a trial by jury. On appeal, the defendant argued that the right to trial by jury was a "fundamental" right guaranteed by the U.S. Constitution and that Congress did not have the power to deny that right by statute. Although the Court ultimately ruled that the Constitution did not require a right to jury trial in the Philippines, it did so only after examining the legal traditions employed in the Philippines prior to annexation as a U.S. territory, the significance of the constitutional right asserted, and the ability of the existing system to accept the burdens of applying new constitutional constraints. In reaching its conclusion that a right to trial by jury was not a "fundamental" right guaranteed outside of the United States, the Court emphasized that the legal system pursuant to which the defendant was prosecuted already provided numerous procedural safeguards, including fact finding by judges, a right of appeal, a right to testify, a right to retain counsel, a right to confront witnesses, a right against self-incrimination, and a right to due process. *Id.* at 145. After suggesting that a large majority of the population would be unfit to serve as jurors, the Court further noted that recognizing a fundamental constitutional right to a jury trial might, in fact, "work injustice and provoke disturbance rather than . . . aid the orderly administration of justice." *Id.* at 148.[25]

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[25] At a time critics might call less enlightened, the *Dorr* opinion expressed a fear that further expansion of the application of the Constitution might result in requiring "savages" to serve as jurors. *Id.*

That holding was reaffirmed in a similar criminal case involving a prosecution for libel in Puerto Rico. *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922).[26] Like the defendant in *Dorr*, the defendant in the Puerto Rican case claimed his denial of a jury trial violated Article III and the Sixth Amendment of the U.S. Constitution. Unlike the defendant in *Dorr*, however, the defendant in *Balzac* was a United States citizen. The Court rejected that this distinction held any significance, reiterating that a right to trial by jury was not a "fundamental" right and emphasizing that U.S. citizens had no constitutional right to a trial by jury in a proceeding outside of the United States. As the Court explained, "It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it." 258 U.S. at 309.

A plurality opinion issued by the Supreme Court in *Reid v. Covert*, 354 U.S. 7 (1957) sharply criticized this portion of the *Balzac* opinion and argued for the further liberalization of the application of the Constitution outside of the United States. *Reid* involved two wives charged with the capital murders of their husbands. Both men were soldiers in the United States military and were killed at overseas posts, one in England and the other in Japan. The wives, who were American citizens, were tried and convicted abroad by courts martial under the Uniform Code of Military Justice and subsequently sought *habeas* relief, arguing that as civilians they were entitled under the Constitution to civilian trials. Initially, a majority of the Court ruled in the Japanese case during the previous term that the guarantees of an indictment by grand jury and subsequent jury trial under the Fifth and Sixth Amendments in a prosecution by the United States

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[26] Citations to most, if not all, Insular Cases decided during the period between *Dorr* and *Balzac* can be found in *United States v. Pollard*, 209 F. Supp.2d 525, 539 n.17 (D. Virgin Islands 2002), *rev'd*, 326 F.3d 397 (3rd Cir. 2003).

government did not apply in foreign lands for acts committed outside the United States. *Kinsella v. Krueger*, 351 U.S. 470 (1956). Upon further argument and reconsideration the following term, however, the Court overruled its earlier decision, with four Justices subscribing to a plurality opinion and two Justices issuing separate opinions concurring in the result.

The plurality began its analysis of the issues with the following pronouncement, a marked contrast from the language used a half century earlier in *Ross*:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government.

354 U.S. at 5-6 (footnotes omitted). After noting the language of the Fifth Amendment expressly states that "no person" shall be tried far a capital crime without a grand jury indictment and acknowledging that the Sixth Amendment requires that "in all criminal prosecutions" the defendant shall enjoy the right to a speedy and public trial, *id.* at 7, the plurality was critical of the narrower, "fundamental rights" approach taken in the previous Insular Cases, at least as applied to U.S. citizens, and explained, "While it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of

the Federal Government by the Constitution and its Amendments." *Id.* at 8-9. The plurality went on to clarify that the "fundamental" rights approach limiting the full application of the Constitution to territories under U.S. control had been intended to avoid disruption of long established practices and to expedite the carrying out of justice in the insular possessions. *Id.* at 13. Accordingly, the plurality suggested that any further abridgement of constitutional rights under a "fundamental" rights approach should not be countenanced. They reasoned, "If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes." *Id.* at 14.

In his concurring opinion, Justice Harlan, who had voted to deny *habeas* relief in the case during the previous term, explained that his change of opinion was based on an increased concern about the fact that the underlying crimes for which the defendants were charged were capital offenses. *Id.* at 65. He was careful to emphasize, however, his belief that the Insular Cases still had "vitality," *id.* at 67, and that the precedent remained "good authority for the proposition that there is no rigid rule that jury trial must *always* be provided in the trial of an American overseas, if the circumstances are such that trial by jury would be impractical and anomalous." *Id.* at 75 (emphasis in the original). Justice Harlan posited further that the types of constitutional rights that should apply overseas depended on "the particular local setting, the practical necessities, and the possible alternatives." *Id.* Agreeing with what Justice Frankfurter wrote in a separately concurring opinion, Justice Harlan commented that the issue was analogous to a due process inquiry in which the courts must look to the particular circumstances of a particular case to determine what constitutional safeguards should apply. *Id.*

Because of the lack of a five Justice majority in *Reid*, *Balzac* continues to be interpreted as binding authority. Thus, for example, the Fifth Circuit held that a U.S. citizen charged with distribution of cocaine in the United States District Court for the Canal Zone District at Balboa was not entitled to the nonfundamental rights to a grand jury indictment and to a jury that had the potential to include military personnel. *Government of the Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974) ("non-citizens and citizens of the United States resident in such territories are treated alike, since it is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive"). Indeed, although *Reid* far from settled the issue of the Constitution's application abroad, it certainly did not weaken the long held doctrine that fundamental constitutional rights cannot be denied in territories under the control of the American government, even where the United States technically is not considered "sovereign" and where the claimant is not a United States citizen.

The District of Columbia Circuit so recognized in a case this Court finds to be particularly relevant to the litigation presently under consideration. *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977), required the application of the Fifth Amendment to U.S. government activities in Micronesia, a "Trust Territory" pursuant to a United Nations designation under which the United States acted as administrator. More specifically, the case involved a constitutional challenge to the procedures undertaken by a commission created by Congress to compensate residents who suffered property damage as a result of American military activities against Japan during World War II. The plaintiff in that case owned a home that had been destroyed by the American offensive, and although the commission ultimately awarded compensation, the commission's valuation of the plaintiff's loss was lower than what he had claimed. More significantly, the valuation was based on evidence that the plaintiff was not permitted to examine or rebut. In addressing whether the Due Process Clause of the

Fifth Amendment regulated the commission's valuation procedures, the D.C. Circuit expressly recognized that the United States was not technically "sovereign" over Micronesia, 569 F.2d at 61.9 n.71, and noted that the exact scope of the Constitution's foreign reach was a "matter of some controversy," commenting on the criticism in the *Reid* plurality opinion of the more limited "fundamental" rights approach taken in the Insular Cases. *Id.* at 618 & n.69. Nonetheless, the court concluded that at a minimum, due process was a "fundamental" right even with respect to property and that "it is settled that 'there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law.'" *Id.* at 618-19 (*quoting Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 669 n.5 (1974)). Thus, the court required the commission to give the plaintiff access to the evidence upon which its decision relied.[27]

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[27] At least twice since the *Ralpho* decision, the D.C. Circuit recognized the continuing murkiness of whether the Constitution provides protection to noncitizens abroad in cases involving action by American authorities in locales far from the absolute control of the U.S. Congress. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), involved a claim by Nicaraguan citizens and residents that the alleged support of the Contras by American government officials violated Fourth and Fifth Amendment rights. The Court of Appeals found it unnecessary to resolve whether the Constitution applied in Nicaragua by concluding that even if it did, other grounds prevented the plaintiffs from recovering the relief they sought. *Id.* at 208. The second case, *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988), involved the seizure and alleged mistreatment of a Lebanese citizen by FBI agents on a boat off the coast of Cyprus. At his trial in District Court for alleged hijacking, the defendant sought the suppression of a confession he provided while in international waters on the ground that his interrogation violated asserted Fifth Amendment rights. Again, the majority avoided the threshold issue of extraterritorial application of the Constitution by accepting a stipulation between the prosecution and defendant that the Fifth Amendment was applicable. *Id.* at 957.

The Supreme Court again tried to bring some clarity to the issue of extraterritorial application of the Constitution when it reviewed the legality of the search and seizure by American government officials of items in the Mexican residence of a Mexican citizen charged with various narcotics-related offenses under U.S. law. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Citing language from *Reid* that "the Constitution imposes substantive constraints on the Federal Government, even when it operates abroad," the Court of Appeals for the Ninth Circuit had ruled that the Fourth Amendment required the suppression of the evidence gained through the search, notwithstanding its conclusion that a search warrant obtained in the United States would have had no legal validity in Mexico. 856 F.2d 1214, 1218 (9th Cir. 1988). The Supreme Court reversed and began its analysis with a comparison of the language in the Fourth Amendment with the terminology in the Fifth and Sixth Amendments, noting that the Fourth Amendment is written to apply to "the people" while the Fifth and Sixth Amendments protect "person[s]" and the "accused." 494 U.S. at 265-66. The Court interpreted the linguistic differences as evidence that the drafters of the Fourth Amendment intended it to protect the people of the United States rather than to impose restrictions on the government against nonresident aliens. *Id.* at 266.

Perhaps more significant for purposes of these Guantanamo detainee cases, the majority opinion then addressed the Insular Cases and reaffirmed that in U.S. territories, only "fundamental" constitutional rights are guaranteed. Accordingly, the Court concluded that the ability of noncitizens in foreign countries to invoke Fourth Amendment rights must be even weaker. *Id.* at 268. Citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court then declared, "Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." 494 U.S. at 269. The Court described its rejection in *Eisentrager* of the extraterritorial application of the Fifth Amend-

ment as "emphatic," and concluded that if the Fifth Amendment, with the universal term "person," did not apply to aliens extraterritorially, then neither should the Fourth Amendment, which applies only to "the people." *Id.*

Justice Kennedy joined the majority opinion but also wrote a separate concurring opinion. Minimizing the majority opinion's reliance on the term "the people" as used in the Fourth Amendment, Justice Kennedy preferred to focus on the Insular Cases and *Reid*, giving particular attention to Justice Harlan's concurring opinion. More specifically, Justice Kennedy invoked a contextual due process analysis to resolve the issue, making specific reference to Justice Harlan's comments that there is no rigid and abstract rule that requires Congress to provide all constitutional guarantees overseas where to do so would be "impracticable and anomalous." *Id.* at 277-78 (*quoting Reid*, 354 U.S. at 74). Ultimately, Justice Kennedy concluded that under the facts of the case, it would have been impracticable and anomalous to require the U.S. authorities to obtain a warrant for a search of property in Mexico, citing the lack of Mexican judicial officials to issue such warrants, potentially differing concepts of privacy and what would constitute an "unreasonable" search, and practical difficulties involved in dealing with foreign officials. *Id.* at 278.

So existed the state of relevant constitutional law at the time of Judge Kollar-Kotelly's dismissals of *Rasul, Al Odah*, and *Habib*. As a technical matter, her dismissals were not based on a finding that the Guantanamo detainees lacked underlying substantive constitutional rights, although the opinion does make brief references to some of the Insular Cases and to the Supreme Court's reference in *Verdugo-Urquidez* to the lack of extraterritorial Fifth Amendment rights. Rather, the District Court dismissed on the basis that it lacked jurisdiction under the *habeas* statute, 28 U.S.C. §§ 2241 and 2242, in light of the Supreme Court's decision in

Eisentrager. In that case, the Supreme Court held that federal courts did not have the authority to entertain the *habeas* claims of German nationals captured in China, convicted of war crimes by a U.S. military commission in China, and serving their sentences in a Landsberg prison, located in Germany but administered by the U.S. military. The crucial aspect of the *Eisentrager* decision, according to Judge Kollar-Kotelly, was its conclusion that *habeas* relief could not be granted to individuals in custody outside the sovereign territory of the United States. Her opinion emphasized the importance of the conclusion that the Guantanamo Bay Naval Base is not on sovereign United States territory, and rejected the argument made by counsel for the detainees that under *Ralpho v. Bell, de facto* sovereignty, rather than *de jure* sovereignty, was sufficient support for *habeas* jurisdiction. While recognizing that Micronesia, the location at issue in *Ralpho*, was not *de jure* sovereign U.S. territory, the District Court concluded that those islands are much more similar in character and status to sovereign territories than Guantanamo Bay is. According to the District Court, "The military base at Guantanamo Bay, Cuba, is nothing remotely akin to a territory of the United States, where the United States provides certain rights to the inhabitants. Rather, the United States merely leases an area of land for use as a naval base." 215 F. Supp.2d at 71.

In reviewing the District Court's decision dismissing the cases far lack of *habeas* jurisdiction, the D.C. Circuit took a somewhat different approach, relying more heavily than the District Court on an analysis of the substantive constitutional rights upon which the detainees' petitions were based. The D.C. Circuit interpreted *Eisentrager* to characterize the right to a writ of *habeas corpus* as a "subsidiary procedural right that follows from the possession of substantive constitutional rights." 321 F.3d at 1140 (*quoting Eisentrager*, 339 U.S. at 781). Further noting that *Eisentrager* rejected the proposition "that the Fifth Amendment confers rights upon all persons,

whatever their nationality, wherever they are located and whatever their offenses," *id.*, the Court of Appeals then commented that this language "may be read to mean that the constitutional rights mentioned are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens." *Id.* at 1140-41. Invoking the language in *Verdugo-Urquidez* that *Eisentrager* "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States" and that such rejection in *Eisentrager* was "emphatic," the Court of Appeals then noted its previous reliance on *Verdugo-Urquidez* and *Eisentrager* in earlier cases that made clear that "[t]he law of the circuit now is that a 'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.'" *Id.* at 1141 (*quoting People's Mojahedin Org. v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999), and *also citing Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2000), *rev'd sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002); *Pauling v. McElroy*, 278 F.2d 252 (D.C. Cir. 1960); and *32 County Sovereignty Comm. v. Dept of State*, 292 F.3d 797 (D.C. Cir. 2002)). Emphasizing that Guantanamo Bay was not part of sovereign U.S. territory and rejecting any material significance to the U.S. government's practical control over the area, the court thus concluded in *Al Odah*:

> The consequence is that no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States. We cannot see why, or how, the writ maybe made available to aliens abroad when basic constitutional protections are not. This much is at the heart of *Eisentrager*. If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty. *Eisentrager* itself

> directly tied jurisdiction to the extension of constitutional provisions . . . .

Id. at 1141.

The D.C. Circuit's decision was reversed in *Rasul v. Bush*, ___ U.S., ___, 124 S. Ct. 2686 (2004). In reviewing the decision of the Court of Appeals, the majority opinion addressed two grounds upon which a detainee traditionally could assert a right to *habeas* relief: statutory and constitutional. The *Rasul* majority interpreted *Eisentrager* to have focused primarily on the German detainees' lack of a constitutional right to *habeas* review, and distinguished the material facts upon which that portion of the *Eisentrager* decision relied from the circumstances concerning the Guantanamo Bay detainees. Among other distinguishing facts, the *Rasul* opinion emphasized that the Guantanamo Bay detainees were not citizens of countries formally at war with the United States, denied committing any war crimes or other violent acts, were never charged or convicted of wrongdoing, and—most significant to the present motion to dismiss—are imprisoned in "territory over which the United States exercises exclusive jurisdiction and control." 124 S. Ct. at 2693. Next, *Rasul* turned to the issue of statutory *habeas* jurisdiction and ruled that post-*Eisentrager* precedent required the recognition of statutory jurisdiction even over cases brought by petitioners held outside the territorial jurisdiction of any federal district court. Noting that the *habeas* statute made no distinction between citizens and aliens held in federal custody, the Court ultimately ruled that "[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241." *Id.* at 2696.

While conceding as they must in light of the *Rasul* decision that this Court has *habeas* jurisdiction over these cases, the respondents assert in their current motion to dismiss that the Supreme Court did not grant *certiorari* to review the D.C. Circuit's decision that the Guantanamo Bay detainees have no

underlying constitutional rights. Accordingly, the respondents argue, the D.C. Circuit's pronouncement in *Al Odah* that the detainees lack substantive rights is still binding on this Court and the portions of the petitions invoking the Constitution must be dismissed for failure to state a claim upon which relief can be granted. Counsel for the petitioners, on the other hand, assert that in upholding this Court's *habeas* jurisdiction, the Supreme Court also made clear that the Constitution applies to Guantanamo Bay and that the detainees possess substantive constitutional rights. This Court finds the arguments made on behalf of the petitioners in this regard far more persuasive.

As an initial matter, the conclusion that the D.C. Circuit's holding on lack of substantive constitutional rights is no longer the law of the case could be deduced merely from the facts that: (1) the appellate court's opinion emphasized that the existence of *habeas* jurisdiction and substantive constitutional rights were "directly tied," 321 F. 3d at 1141; (2) the appellate court believed *Eisentrager* applied to the facts of these cases and prevented the detainees from asserting substantive constitutional rights; and (3) the Supreme Court held that *habeas* jurisdiction did in fact exist and that *Eisentrager* was inapplicable to these cases. Additionally, and on a more detailed level, careful examination of the specific language used in *Rasul* reveals an implicit, if not express, mandate to uphold the existence of fundamental rights through application of precedent from the Insular Cases.

On appeal to the D.C. Circuit, counsel for the petitioners argued for the application of *Ralpho v. Bell* by challenging the District Court's finding that Guantanamo Bay was simply another naval base on land leased from a foreign sovereign and nowhere near the legal equivalent of a United States territory. 215 F. Supp.2d at 71. The D.C. Circuit rejected the challenge and agreed with the District Court on this point. Although the appellate court conceded that Micronesia, like

Guantanamo Bay, was not technically sovereign U.S. territory, it concluded that *Ralpho* nonetheless did not "justify this court, or any other, to assert habeas corpus jurisdiction at the behest of an alien held at a military base leased from another nation." 321 F.3d at 1144. Instead, the appellate court found Landsberg prison in Germany to be a more suitable analogy, and because *Eisentrager* held that no constitutional rights existed there, the D.C. Circuit concluded that no constitutional rights could exist at Guantanamo Bay. *Rasul*, however, unequivocally rejected the D.C. Circuit's analogy and made clear that Guantanamo Bay cannot be considered a typical overseas military base.

In his concurring opinion in *Rasul*, Justice Kennedy unambiguously repudiated the D.C. Circuit's analogy of Guantanamo Bay to Landsberg prison, and he made a *Ralpho*-type conclusion that Guantanamo Bay was, for all significant purposes, the equivalent of sovereign U.S. territory. He explained:

> Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . [The Guantanamo Bay lease] is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it.

Id. at 2700 (Kennedy, J., concurring) (*citing Eisentrager*, 339 U.S. at 777-78). Although the majority opinion was not as explicit as Justice Kennedy's concurrence, it too found significant the territorial nature of Guantanamo Bay and dismissed the D.C. Circuit's characterization of Guantanamo Bay as nothing more than a foreign military prison. For example, in refusing the application of *Eisentrager*'s consti-

tutional analysis to these cases, the majority took special note that, unlike the German prisoners, the Guantanamo detainees "have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." 124 S. Ct. at 2693. Additionally, in rejecting an argument made by respondents that applying the *habeas* statute to prisoners at Guantanamo Bay would violate a canon of statutory interpretation against extraterritorial application of legislation, the majority wrote:

> Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within the "territorial jurisdiction" of the United States. . . . By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.

124 S. Ct. at 2696 (*citing Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949), in which the Court refused to interpret a statute mandating an eight hour work day to have application to an American citizen working for a contractor in Iran and Iraq absent evidence that the "United States had been granted by the respective sovereignties any authority, legislative or otherwise, over the labor laws or customs of Iran or Iraq.").

These passages alone would be sufficient for this Court to recognize the special nature of Guantanamo Bay and, in accordance with *Ralpho v. Bell*, to treat it as the equivalent of sovereign U.S. territory where fundamental constitutional rights exist. But perhaps the strongest basis for recognizing that the detainees have fundamental rights to due process rests at the conclusion of the *Rasul* majority opinion. In summarizing the nature of these actions, the Court recognized:

> Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-278, 110 S. Ct. 1056, 108 L.Ed.2d 222 (1990) (Kennedy, J., concurring), and cases cited therein.

124 S. Ct. at 2698 n.15. This comment stands in sharp contrast to the declaration in *Verdugo-Urquidez* relied upon by the D.C. Circuit in *Al Odah* that the Supreme Court's "rejection of extraterritorial application of the Fifth Amendment [has been] emphatic." 494 U.S. at 269. Given the *Rasul* majority's careful scrutiny of *Eisentrager*, it is difficult to imagine that the Justices would have remarked that the petitions "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States'" unless they considered the petitioners to be within a territory in which constitutional rights are guaranteed. Indeed, had the Supreme Court intended to uphold the D.C. Circuit's rejection in *Al Odah* of underlying constitutional rights, it is reasonable to assume that the majority would have included in its opinion at least a brief statement to that effect, rather than delay the ultimate resolution of this litigation and require the expenditure of additional judicial resources in the lower courts. To the contrary, rather than citing *Eisentrager* or even the portion of *Verdugo-Urquidez* that referenced the "emphatic" inapplicability of the Fifth Amendment to aliens outside U.S. territory, the *Rasul* Court specifically referenced the portion of Justice Kennedy's concurring opinion in *Verdugo-Urquidez*, that discussed the continuing validity of the Insular Cases, Justice Harlan's concurring opinion in *Reid*

v. Covert, and Justice Kennedy's own consideration of whether requiring adherence to constitutional rights outside of the United States would be "impracticable and anomalous." This Court therefore interprets that portion of the opinion to require consideration of that precedent in the determination of the underlying rights of the detainees.

There would be nothing impracticable and anomalous in recognizing that the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment. Recognizing the existence of that right at the Naval Base would not cause the United States government any more hardship than would recognizing the existence of constitutional rights of the detainees had they been held within the continental United States. American authorities are in full control at Guantanamo Bay, their activities are immune from Cuban law, and there are few or no significant remnants of native Cuban culture or tradition remaining that can interfere with the implementation of an American system of justice.[28] The situation in these cases is very different from the circumstances in *Verdugo-Urquidez*, where the defendant claimed the United States government was required to get a warrant to perform a search in Mexico, a sovereign country that employs an entirely different legal system, lacks officials to issue warrants, and has potentially different concepts of privacy. Similarly, the imposition of constitutional rights would be less difficult at Guantanamo Bay than it was in any of the Insular Cases, where the courts were required to determine whether imposition of American rights such as the

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[28] Ironically, the Cuban government has alleged that the U.S. military is violating the human rights of the detainees at Guantanamo Bay and has demanded more humane treatment of the prisoners. The U.S. government, however, does not appear to have conceded the Cuban government's sovereignty over these matters. *See What's News*, The Wall Street Journal, Jan. 20, 2005, at A1 (2005 WL 59838432); *Cuba Demands US Stop Alleged Abuses at "Illegally Occupied" Guantanamo Base*, Agence France Presse, Jan. 19, 2005 (2005 WL 69517025).

right to trial by jury and indictment by grand jury were even possible in places such as the Philippines and Puerto Rico with native legal systems and populations previously unexposed to American jurisprudence.

Of course, it would be far easier for the government to prosecute the war on terrorism if it could imprison all suspected "enemy combatants" at Guantanamo Bay without having to acknowledge and respect any constitutional rights of detainees. That, however, is not the relevant legal test. By definition, constitutional limitations often, if not always, burden the abilities of government officials to serve their constituencies. Although this nation unquestionably must take strong action under the leadership of the Commander in Chief to protect itself against enormous and unprecedented threats, that necessity cannot negate the existence of the most basic fundamental rights for which the people of this country have fought and died for well over two hundred years. As articulated by the Supreme Court after the conclusion of the Civil War:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Ex Parte Milligan, 71 U.S. 2, 120-21 (1866). *See also United States v. Robel*, 389 U.S. 258, 264 (1967) ("It would indeed

be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.").

In sum, there can be no question that the Fifth Amendment right asserted by the Guantanamo detainees in this litigation—the right not to be deprived of liberty without due process of law—is one of the most fundamental rights recognized by the U.S. Constitution. In light of the Supreme Court's decision in *Rasul*, it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply. Accordingly, and under the precedent set forth in *Verdugo-Urquidez*, *Ralpho*, and the earlier Insular Cases, the respondents' contention that the Guantanamo detainees have no constitutional rights is rejected, and the Court recognizes the detainees' rights under the Due Process Clause of the Fifth Amendment.

B. SPECIFIC REQUIREMENTS OF THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE

Having found that the Guantanamo detainees are entitled to due process under the Fifth Amendment to the United States Constitution, the Court must now address the exact contours of that right as it applies to the government's determinations that they are "enemy combatants." Due process is an inherently flexible concept, and the specific process due in a particular circumstance depends upon the context in which the right is asserted. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Resolution of a due process challenge requires the consideration and weighing of three factors: the private interest of the person asserting the lack of due process; the risk of erroneous deprivation of that interest through use of existing procedures and the probable value of additional or substitute procedural safeguards; and the competing interests of the government, including the financial, administrative, and other burdens that would be incurred were additional

safeguards to be provided. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The Supreme Court applied a *Mathews v. Eldridge* analysis in *Hamdi v. Rumsfeld*, ___U.S. ___, 124 S. Ct. 2633 (2004), a decision issued the same day as *Rasul* which considered an American citizen's due process challenge to the U.S. military's designation of him as an "enemy combatant." Although none of the detainees in the cases before this Court is an American citizen, the facts under *Hamdi* are otherwise identical in all material respects to those in *Rasul*. Accordingly, *Hamdi* forms both the starting point and core of this Court's consideration of what process is due to the Guantanamo detainees in these cases.

In addressing the detainee's private interest in *Hamdi* for purposes of the *Mathews v. Eldridge* analysis, the plurality opinion called it "the most elemental of liberty interests—the interest in being free from physical detention by one's own government." 124 S. Ct. at 2646. Although the detainees in the cases before this Court are aliens and are therefore not being detained by their own governments, that fact does not lessen the significance of their interests in freedom from incarceration and from being held virtually *incommunicado* from the outside world. There is no practical difference between incarceration at the hands of one's own government and incarceration at the hands of a foreign government; significant liberty is deprived in both situations regardless of the jailer's nationality.

As was the case in *Hamdi*, the potential length of incarceration is highly relevant to the weighing of the individual interests at stake here. The government asserts the right to detain an "enemy combatant" until the war on terrorism has concluded or until the Executive, in its sole discretion, has determined that the individual no longer poses a threat to national security. The government, however, has been unable to inform the Court how long it believes the war on terrorism

will last. *See* December 1, 2004 Transcript of Motion to Dismiss (hereinafter "Transcript") at 22-23. Indeed, the government cannot even articulate at this moment how it will determine when the war on terrorism has ended. *Id.* at 24. At a minimum, the government has conceded that the war could last several generations, thereby making it possible, if not likely, that "enemy combatants" will be subject to terms of life imprisonment at Guantanamo Bay. *Id.* at 21; *Hamdi*, 124 S. Ct. at 2641. Short of the death penalty, life imprisonment is the ultimate deprivation of liberty, and the uncertainty of whether the war on terror—and thus the period of incarceration—will last a lifetime may be even worse than if the detainees had been tried, convicted, and definitively sentenced to a fixed term.

It must be added that the liberty interests of the detainees cannot be minimized for purposes of applying the *Mathews v. Eldridge* balancing test by the government's allegations that they are in fact terrorists or are affiliated with terrorist organizations. The purpose of imposing a due process requirement is to prevent mistaken characterizations and erroneous detentions, and the government is not entitled to short circuit this inquiry by claiming *ab initio* that the individuals are alleged to have committed bad acts. *See Hamdi*, 124 S. Ct. at 2647 ("our starting point for the *Mathews v. Eldridge* analysis is unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated"). Moreover, all petitioners in these cases have asserted that they are not terrorists and have not been involved in terrorist activities, and under the standards provided by the applicable rules of procedure, those allegations must be accepted as true for purposes of resolving the government's motion to dismiss.

On the other side of the *Mathews v. Eldridge* analysis is the government's significant interest in safeguarding national security. Having served as the Chief Judge of the United

States Foreign Intelligence Surveillance Court (also known as "the FISA Court"), the focus of which involves national security and international terrorism,[29] this Judge is keenly aware of the determined efforts of terrorist groups and others to attack this country and to harm American citizens both at home and abroad. Utmost vigilance is crucial for the protection of the United States of America. Of course, one of the government's most important obligations is to safeguard this country and its citizens by ensuring that those who have brought harm upon U.S. interests are not permitted to do so again. Congress itself expressly recognized this when it enacted the AUMF authorizing the President to use all necessary and appropriate force against those responsible for the September 11 attacks. The Supreme Court also gave significant weight to this governmental concern and responsibility in *Hamdi* when it addressed the "interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." 124 S. Ct. at 2647. The plurality warned against naivete regarding the dangers posed to the United States by terrorists and noted that the legislative and executive branches were in the best positions to deal with those dangers. As articulated by the plurality, "[T]he law of war and the realities of combat may render . . . detentions both necessary and appropriate, and our due process analysis need not blink at those realities. Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Id.* Indeed, a majority of the Court affirmed the Executive's authority to seize and detain Taliban fighters as long as the conflict in Afghanistan continues, regardless of how indefinite the length of that war may be. *See* the plurality opinion, *id.* at 2641-42, and the dissenting opinion of Justice Thomas, *id.* at 2674.

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[29] *See* 50 U.S.C. § 1803 (2003).

Given the existence of competing, highly significant interests on both sides of the equation—the liberty of individuals asserting complete innocence of any terrorist activity versus the obligation of the government to protect this country against terrorist attacks—the question becomes what procedures will help ensure that innocents are not indefinitely held as "enemy combatants" without imposing undue burdens on the military to ensure the security of this nation and its citizens. The four member *Hamdi* plurality answered this question in some detail, and although the two concurring members of the Court, Justice Souter and Justice Ginsburg, emphasized a different basis for ruling in favor of Mr. Hamdi, they indicated their agreement that, at a minimum, he was entitled to the procedural protections set forth by the plurality. *Id.* at 2660.

According to the plurality in *Hamdi*, an individual detained by the government on the ground that he is an "enemy combatant" "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 2648. Noting the potential burden these requirements might cause the government at a time of ongoing military conflict, the plurality stated that it would not violate due process for the decision maker to consider hearsay as the most reliable available evidence. *Id.* at 2649. In addition, the plurality declared it permissible to adopt a presumption in favor of "enemy combatant" status, "so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." *Id.* For that presumption to apply and for the onus to shift to the detainee, however, the plurality clarified that the government first would have to "put[] forth credible evidence that the [detainee] meets the enemy-combatant criteria." *Id.*[30]

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[30] Justice Souter, whose opinion was joined by Justice Ginsburg, indicated he did not believe that such a presumption was constitutionally

After setting forth these standards, the plurality suggested the "possibility" that constitutional requirements of due process could be met by an "appropriately authorized and properly constituted military tribunal" and referenced the military tribunals used to determine whether an individual is entitled to prisoner of war status under the Geneva Convention. *Id.* at 2651 (*citing* Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997)). In the absence of a tribunal following constitutionally mandated procedures, however, the plurality declared that it was the District Court's obligation to provide those procedural rights to the detainee in a *habeas* action. Again recognizing the enormous significance of the interests of both detainees and the government, the plurality affirmed the proper role of the judiciary in these matters, stating "We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns." *Id.* at 2652. The plurality concluded by affirming that the detainee "unquestionably [had] the right to access to counsel in connection with the proceedings on remand." *Id.*

Hamdi was decided before the creation of the Combatant Status Review Tribunal, and the respondents contend in their motion to dismiss that were this Court to conclude that the detainees are entitled to due process under the Fifth Amendment, the CSRT proceedings would fully comply with all constitutional requirements. More specifically, the respondents claim that the CSRT regulations were modeled after Army Regulation 190-8 governing the determination of prisoner of war status, referenced in *Hamdi*, and actually

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permissible when he wrote, "I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on [the detainee]." *Id.* at 2660.

exceed the requirements set forth by the *Hamdi* plurality. For example, respondents cite the facts that under CSRT rules, tribunal members must certify that they have not been involved in the "apprehension, detention, interrogation, or previous determination of status of the detainee[s]," that detainees are provided a "Personal Representative" to assist in the preparation of their cases, that the "Recorder"—that is, the person who presents evidence in support of "enemy combatant" status—must search for exculpatory evidence, that the detainee is entitled to an unclassified summary of the evidence against him, and that the tribunal's decisions are reviewed by a higher authority. Motion to Dismiss at 34-35. Notwithstanding the procedures cited by the respondents, the Court finds that the procedures provided in the CSRT regulations fail to satisfy constitutional due process requirements in several respects.

C. SPECIFIC CONSTITUTIONAL DEFECTS IN THE CSRT PROCESS AS WRITTEN IN THE REGULATIONS AND AS APPLIED TO THE DETAINEES

The constitutional defects in. the CSRT procedures can be separated into two categories. The first category consists of defects which apply across the board to all detainees in the cases before this Judge. Specifically, those deficiencies are the CSRT's failure to provide the detainees with access to material evidence upon which the tribunal affirmed their "enemy combatant" status and the failure to permit the assistance of counsel to compensate for the government's refusal to disclose classified information directly to the detainees. The second category of defects involves those which are detainee specific and may or may not apply to every petitioner in this litigation. Those defects include the manner in which the CSRT handled accusations of torture and the vague and potentially overbroad definition of "enemy combatant" in the CSRT regulations. While additional specific defects may or may not exist, further inquiry is unnec-

essary at this stage of the litigation given the fundamental deficiencies detailed below.

1. General Defects Existing in All Cases Before the Court: Failure to Provide Detainees Access to Material Evidence Upon Which the CSRT Affirmed "Enemy Combatant" Status and Failure to Permit the Assistance of Counsel

The CSRT reviewed classified information when considering whether each detainee presently before this Court should be considered an "enemy combatant," and it appears that all of the CSRT's decisions substantially relied upon classified evidence. No detainee, however, was ever permitted access to any classified information nor was any detainee permitted to have an advocate review and challenge the classified evidence on his behalf. Accordingly, the CSRT failed to provide any detainee with sufficient notice of the factual basis for which he is being detained and with a fair opportunity to rebut the government's evidence supporting the determination that he is an "enemy combatant."

The inherent lack of fairness of the CSRT's consideration of classified information not disclosed to the detainees is perhaps most vividly illustrated in the following unclassified colloquy, which, though taken from a case not presently before this Judge, exemplifies the practical and severe disadvantages faced by all Guantanamo prisoners. In reading a list of allegations forming the basis for the detention of Mustafa Ait Idr,[31] a petitioner in *Boumediene v. Bush*, 04-CV-1166 (RJL), the Recorder of the CSRT asserted, "While living in Bosnia, the Detainee associated with a known Al

[31] Although the petition for writ of *habeas corpus* filed on behalf of this detainee and related documents refer to him as "Mustafa Ait Idir," the proper spelling of his *name* appears to be "Mustafa Ait Idr."

Qaida operative." In response, the following exchange occurred:

> Detainee: Give me his name.
>
> Tribunal President: I do not know.
>
> Detainee: How can I respond to this?
>
> Tribunal President: Did you know of anybody that was a member of Al Qaida?
>
> Detainee: No, no.
>
> Tribunal President: I'm sorry, what was your response?
>
> Detainee: No.
>
> Tribunal President: No?
>
> Detainee: No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.
>
> Tribunal President: We are asking you the questions and we need you to respond to what is on the unclassified summary.

Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner Mustafa Aft Idir, filed October 27, 2004, Enclosure (3) at 13. Subsequently, after the Recorder read the allegation that the detainee was arrested because of his alleged involvement in a plan to attack the U.S. Embassy in Sarajevo, the detainee expressly asked in the following

colloquy to see the evidence upon which the government's assertion relied:

> Detainee: . . . The only thing I can tell you is I did not plan or even think of [attacking the Embassy]. Did you find any explosives with me? Any weapons? Did you find me in front of the embassy? Did you find me in contact with the Americans? Did I threaten anyone? I am prepared now to tell you, if you have anything or any evidence, even if it is just very little, that proves I went to the embassy and looked like that [Detainee made a gesture with his head and neck as if he were looking into a building or a window] at the embassy, then I am ready to be punished. I can just tell you that I did not plan anything. Point by point, when we get to the point that I am associated with Al Qaida, but we already did that one.
>
> Recorder: It was [the] statement that preceded the first point.
>
> Detainee: If it is the same point, but I do not want to repeat myself. These accusations, my answer to all of them is I did not do these things. But I do not have anything to prove this. The only thing is the citizenship. I can tell you where I was and I had the papers to prove so. But to tell me I planned to bomb, I can only tell you that I did not plan.
>
> Tribunal President: Mustafa, does that conclude your statement?
>
> Detainee: That is it, but I was hoping you had evidence that you can give me. If I was in your place—and I apologize in advance for these words—but if a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that.

> [Everyone in the Tribunal room laughs.]
>
> Tribunal President: We had to laugh, but it is okay.
>
> Detainee: Why? Because these are accusations that I can't even answer. I am not able to answer them. You tell me I am from Al Qaida, but I am not an Al Qaida. I don't have any proof to give you except to ask you to catch Bin Laden and ask him if I am a part of Al Qaida. To tell me that I thought, I'll just tell you that I did not. I don't have proof regarding this. What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it.

Id. at. 14-15. The laughter reflected in the transcript is understandable, and this exchange might have been truly humorous had the consequences of the detainee's "enemy combatant" status not been so terribly serious and had the detainee's criticism of the process not been so piercingly accurate.[32]

Another illustration of the fundamental unfairness of the CSRT's reliance on classified information not disclosed to the detainees arises in the government's classified factual return to the petition filed by Murat Kurnaz in *Kurnaz v. Bush*, 04-CV-1135 (ESH). Mr. Kurnaz is a Turkish citizen and permanent resident of Germany who was arrested by police in Pakistan and turned over to American authorities. The CSRT concluded that he was a member of al Qaeda and stated that this determination was based on unclassified evidence and on

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[32] This is not to say whether or not the government was able to present any inculpatory evidence during the CSRT proceeding against the detainee. The primary purpose of the Memorandum Opinion's reference to the transcript at this stage of the litigation is to illustrate the detainees' lack of any reasonable opportunity to confront the government's evidence against them and not to resolve whether or not this particular detainee did in fact plan to attack the U.S. Embassy.

one classified document, attached to the factual return as Exhibit R19. Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner Murat Kurnaz (hereinafter "Kurnaz Factual Return"), filed October 18, 2004, Enclosure (2).[33]

The Court does not find that the unclassified evidence alone is sufficiently convincing in supporting the CSRT's conclusion that he is a member of al Qaeda.[34] That evidence establishes that Mr. Kurnaz attended a mosque in Bremen, Germany which the CSRT found to be moderate in its views but also to have housed a branch of Jama'at-Al-Tabliq (hereinafter "JT"), a missionary organization alleged to have supported terrorist organizations. Kurnaz Factual Return, Enclosure (1) at 2. The unclassified evidence also establishes that Mr. Kurnaz had been friends with an individual named Selcuk Belgin, who is alleged to have been a suicide bomber, and that the detainee traveled to Pakistan to attend a JT school. *Id.* at 2-3. Nowhere does the CSRT express any finding based on unclassified evidence that the detainee planned to be a suicide bomber himself, took up arms against the United States, or otherwise intended to attack American interests. Thus, the most reasonable interpretation of the record is that the classified document formed the most important basis for the CSRT's ultimate determination. That document, however, was never provided to the detainee, and

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[33] Although the tribunal makes several references to. its reliance on Exhibit R12, those references were typographical errors and the document actually relied upon was Exhibit R19, as recognized by the tribunal's Legal Advisor. *See* October 14, 2004 Memorandum from James R. Crisfield Jr. to the Director, Combatant Status Review Tribunal, attached to the Kurnaz Factual Return.

[34] In fact, for reasons stated later in this opinion, even if all of the unclassified evidence were accepted as true, it alone would not form a constitutionally permissible basis for the indefinite detention of the petitioner. *See infra* section II.C.2.b.

had he received it, he would have had the opportunity to challenge its credibility and significance.

* * *

* * *

call into serious question the nature and thoroughness of the prior "multiple levels of review" of "enemy combatant" status referenced in Deputy Secretary of Defense Paul Wolfowitz's July 7, 2004 Order establishing the CSRT system. At a minimum, the documents raise the question of

* * *

Interpreted in a light most favorable to the petitioners, the CSRT's decision to deem Exhibit R19 the most credible evidence without a sufficient explanation for * * * * supports the petitioners' allegation that the "CSRTs do not involve an impartial decisionmaker." Al Odah Petitioners' Reply to the Government's "Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss," filed in *Al Odah v. United States*, 02-CV-0828 (CKK), on October 20, 2004, at 23-24. But however the record in *Kurnaz* is interpreted, it definitively establishes that the detainee was not provided with a fair opportunity to contest the material allegations against him.

The Court fully appreciates the strong governmental interest in not disclosing classified evidence to individuals believed to be terrorists intent on causing great harm to the United States. Indeed, this Court's protective order prohibits the disclosure of any classified information to any of the petitioners in these *habeas* cases. Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 344 F. Supp.2d 174 (D.D.C. 2004) at ¶ 30. To compensate for the resulting hardship to the petitioners and to ensure due process in the litigation of these cases, however, the protective order

requires the disclosure of all relevant classified information to the petitioners' counsel who have the appropriate security clearances. *Id.* at ¶¶ 17-34. Although counsel are not permitted to share any classified information with their clients, they at least have the opportunity to examine all evidence relied upon by the government in making an "enemy combatant" status determination and to investigate and ensure the accuracy, reliability and relevance of that evidence. Thus, the governmental and private interests have been fairly balanced in a manner satisfying constitutional due process requirements. In a similar fashion, the rules regulating the military commission proceedings for aliens—rules which the government so vigorously defended in *Hamdan v. Rumsfeld*—expressly provide that although classified evidence may be withheld from the defendant, it may not be withheld from defense counsel. Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. § 9.6(b)(3) ("A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof."). In contrast, the CSRT regulations do not properly balance the detainees' need for access to material evidence considered by the tribunal against the government's interest in protecting classified information.

The CSRT regulations do acknowledge to some extent the detainees' need for assistance during the tribunal process, but they fall far short of the procedural protections that would have existed had counsel been permitted to participate. The implementing regulations create the position of "Personal Representative" for the purpose of "assist[ing] the detainee in reviewing all relevant unclassified information, in preparing and presenting information, and in questioning witnesses at the CSRT." July 29, 2004 Implementing Regulations at Enclosure (1), ¶ C(3). But notwithstanding the fact that the

Personal Representative may review classified information considered by the tribunal, that person is neither a lawyer nor an advocate and thus cannot be considered an effective surrogate to compensate for a detainee's inability to personally review and contest classified evidence against him. *Id.* at Enclosure (3), ¶ D. Additionally, there is no confidential relationship between the detainee and the Personal Representative, and the Personal Representative is obligated to disclose to the tribunal any relevant inculpatory information he obtains from the detainee. *Id.* Consequently, there is inherent risk and little corresponding benefit should the detainee decide to use the services of the Personal Representative.

The lack of any significant advantage to working with the Personal Representative is illustrated by the record of Kurnaz. Despite the existence of * * * the Personal Representative made no request for further inquiry regarding * * * Kurnaz Factual Return, Enclosure (5). Clearly, the presence of counsel for the detainee, even one who could not disclose classified evidence to his client, would have ensured a fairer process in the matter by highlighting weaknesses in evidence considered by the tribunal and helping to ensure that erroneous decisions were not made regarding the detainee's "enemy combatant" status. The CSRT rules, however, prohibited that opportunity.

In sum, the CSRT's extensive reliance on classified information in its resolution of "enemy combatant" status, the detainees" inability to review that information, and the prohibition of assistance by counsel jointly deprive the detainees of sufficient notice of the factual bases for their detention and deny them a fair opportunity to challenge their incarceration. These grounds alone are sufficient to find a violation of due process rights and to require the denial of the respondents' motion to dismiss these cases.

2. Specific Defects That May Exist in Individual Cases: Reliance on Statements Possibly Obtained Through Torture or Other Coercion and a Vague and Overly Broad Definition of "Enemy Combatant"

Additional defects in the CSRT procedures support the denial of the respondents' motion to dismiss at least some of the petitions, though these grounds mayor may not exist in every case before the Court and though the respondents might ultimately prevail on these issues once the petitioners have been given an opportunity to litigate them fully in the *habeas* proceedings.

a. Reliance on Statements Possibly Obtained Through Torture or Other Coercion

The first of these specific grounds involves the CSRT's reliance on statements allegedly obtained through torture or otherwise alleged to have been provided by some detainees involuntarily. The Supreme Court has long held that due process prohibits the government's use of involuntary statements obtained through torture or other mistreatment. In the landmark case of *Jackson v. Denno*, 378 U.S. 368 (1964), the Court gave two rationales for this rule: first, "because of the probable unreliability of confessions that are obtained in a manner deemed coercive," and second "because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.'" 378 U.S. at 386 (*quoting Blackburn v. Alabama*, 361 U.S. 199 (1960)). *See also Lam v. Kelchner*, 304 F.3d 256, 264 (3rd Cir. 2002) ("The voluntariness standard is intended to ensure the reliability of incriminating statements and to deter improper police conduct."). Arguably, the second rationale may not be as relevant to these habeas cases as it is to criminal prosecutions in U.S. courts, given that the judiciary clearly does not have the supervisory powers over the U.S. military as it does over

prosecutors, who are officers of the court. *Cf. United States v. Toscanino*, 500 F.2d 267, 276 (2d Cir. 1974) (the supervisory power of the district courts "may legitimately be used to prevent [them] from themselves becoming 'accomplices in willful disobedience of law'") (*quoting McNabb v. United States,* 318 U.S. 332, 345 (1943)). At a minimum, however, due process requires a thorough inquiry into the accuracy and reliability of statements alleged to have been obtained through torture. *See Clanton v. Cooper*, 129 F.3d 1147, 1157-58 (10th Cir. 1997) ("[B]ecause the evidence is unreliable and its use offends the Constitution, a person may challenge the government's use against him or her of a coerced confession given by another person."); *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994) ("Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause.").

Interpreting the evidence in a light most favorable to the petitioners as the Court must when considering the respondents' motion to dismiss, it can be reasonably inferred that the CSRT did not sufficiently consider whether the evidence upon which the tribunal relied in making its "enemy combatant" determinations was coerced from the detainees. The allegations and factual return of Mamdouh Habib, a petitioner in *Habib v. Bush*, 02-CV-1130 (CKK) are illustrative in this regard. Mr. Habib has alleged that after his capture by allied forces in Pakistan, he was sent to Egypt for interrogation and was subjected to torture there, including routine beatings to the point of unconsciousness. Petitioner's Memorandum of Points and Authorities in Support of His Application for Injunctive Relief, filed with the Court Security Officer on November 23, 2004 and on the public record on January 5, 2005. Additionally, the petitioner contends that he was locked in a room that would gradually be filled with water to a level just below his chin as he stood for hours on the tips of his toes. *Id.* He further claims that he was suspended from a wall

with his feet resting on the side of a large electrified cylindrical drum, which forced him either to suffer pain from hanging from his arms or pain from electric shocks to his feet. *Id.* The petitioner asserts that as a result of this treatment, he made numerous "confessions" that can be proven false. *Id.* at n.3. According to the classified factual return for Mr. Habib, * * * and the CSRT found the allegations of torture serious enough to refer the matter on September 22, 2004 to the Criminal Investigation Task Force. *Id.*, Enclosure (1) at 3. * * * Examined in the light most favorable to the petitioner, this reliance cannot be viewed to have satisfied the requirements of due process.

Mr. Habib is not the only detainee before this Court to have alleged making confessions to interrogators as a result of torture. * * * Notwithstanding the inability of counsel for petitioners to take formal discovery beyond interviewing their clients at Guantanamo Bay, they have introduced evidence into the public record indicating that abuse of detainees occurred during interrogations not only in foreign countries but at Guantanamo Bay itself. One illustration of alleged mistreatment during interrogation by U.S. authorities is Exhibit D to the petitioners' Motion for Leave to Take Discovery and for Preservation Order, filed in several of these cases with the Court Security Officer on January 6, 2005 and filed on the public record on January 10, 2005. In that document, dated August 2, 2004, the author apparently affiliated with the Federal Bureau of Investigation but whose identity has been redacted, summarized his or her observations of interrogation activities at Guantanamo Bay as follows:

> On a couple of occassions [sic], I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defacated [sic] on themselves, and had been left there for 18-24 hours or more. On one occassion [sic], the air conditioning had been turned down so far and the temperature was so cold in the

> room, that the barefooted detainee was shaking with cold. When I asked the MP's what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occassion [sic], the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconcious [sic] on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occassion [sic], not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.

The identities of the detainees referenced in this document are unknown to the Court and therefore, it is not certain whether they are even petitioners in any of these cases and, if so, whether the results of the above-described interrogations were used against them in CSRT proceedings. Of course, the veracity of Exhibit D itself must be investigated before it can be definitively relied upon. Indeed, at this stage of the litigation it is premature to make any final determination as to whether any information acquired during interrogations of any petitioner in these cases and relied upon by the CSRT was in fact the result of torture or other mistreatment. What this Court needs to resolve at this juncture, however, is whether the petitioners have made sufficient allegations to allow their claims to survive the respondents' motion to dismiss. On that count, the Court concludes that the petitioners have done so.

b. Vague and Overly Broad Definition of "Enemy Combatant"

Although the government has been detaining individuals as "enemy combatants" since the issuance of the AUMF in

2001, it apparently did not formally define the term until the July 7, 2004 Order creating the CSRT. The lack of a formal definition seemed to have troubled at least the plurality of the Supreme Court in *Hamdi*, but for purposes of resolving the issues in that case, the plurality considered the government's definition to be an individual who was "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who engaged in an armed conflict against the United States there." 124 S. Ct. 2633, 2639 (*quoting* Brief for the Respondents) (emphasis added). The Court agreed with the government that the AUMF authorizes the Executive to detain individuals falling within that limited definition, *id.*, with the plurality explaining that "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here." *Id.* at 2641. The plurality cautioned, however, "that indefinite detention for the purpose of interrogation is not authorized" by the AUMF, and added that a congressional grant of authority to the President to use "necessary and appropriate force" might not be properly interpreted to include the authority to detain individuals for the duration of a particular conflict if that conflict does not take a form that is based on "longstanding law-of-war principles." *Id.*

The definition of "enemy combatant" contained in the Order creating the CSRT is significantly broader than the definition considered in *Hamdi*. According to the definition currently applied by the government, an "enemy combatant" "shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This *includes* any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." July 7, 2004 Order at 1 (emphasis

added). Use of the word "includes" indicates that the government interprets the AUMF to permit the indefinite detention of individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies. This Court explored the government's position on the matter by posing a series of hypothetical questions to counsel at the December 1, 2004 hearing on the motion to dismiss. In response to the hypotheticals, counsel for the respondents argued that the Executive has the authority to detain the following individuals until the conclusion of the war on terrorism: "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities," Transcript at 25, a person who teaches English to the son of an al Qaeda member, *id.* at 27, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source. *Id.* at 29.

The Court can unequivocally report that no factual return submitted by the government in this litigation reveals the detention of a Swiss philanthropist, an English teacher, or a journalist. The Court can also acknowledge the existence of specific factual returns containing evidence indicating that certain detainees fit the narrower definition of "enemy combatant" approved by the Supreme Court in *Hamdi*. The petitioners have argued in opposition to the respondents' motion to dismiss, however, that at least with respect to some detainees, the expansive definition of "enemy combatant" currently in use in the CSRT proceedings violates long standing principles of due process by permitting the detention of individuals based solely on their membership in anti-American organizations rather than on actual activities supporting the use of violence or harm against the United States. Al Odah Petitioners' Reply to the Government's "Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss" at 25-26 (*citing Scales v. United States*, 367 U.S. 203, 224-225 (1961); *Carlson v. Landon*, 342 U.S. 524, 541 (1952)).

Whether the detention of each individual petitioner is authorized by the AUMF and satisfies the mandates of due process must ultimately be determined on a detainee by detainee basis. At this stage of the litigation, however, sufficient allegations have been made by at least some of the petitioners and certain evidence exists in some CSRT factual returns to warrant the denial of the respondents'. motion to dismiss on the ground that the respondents have employed an overly broad definition of "enemy combatant." Examples of cases where this issue is readily apparent are *Kurnaz v. Bush*, 04-CV-1135 (ESH), and *El-Banna v. Bush*, 04-CV-1144 (RWR).

As already discussed above, the unclassified evidence upon which the CSRT relied in determining Murat Kurnaz's "enemy combatant" status consisted of findings that he was "associated" with an Islamic missionary group named Jama'at-Al-Tabliq, that he was an "associate" of and planned to travel to Pakistan with an individual who later engaged in a suicide bombing, and that he accepted free food, lodging, and schooling in Pakistan from an organization known to support terrorist acts. Kurnaz Factual Return, Enclosure (1) at 1. While these facts may be probative and could be used to bolster the credibility of other evidence, if any, establishing actual activities undertaken to harm American interests, by themselves they fall short of establishing that the detainee took any action or provided any direct support for terrorist actions against the U.S. or its allies. Nowhere does any unclassified evidence reveal that the detainee even had knowledge of his associate's planned suicide bombing, let alone establish that the detainee assisted in the bombing in any way. In fact, the detainee expressly denied knowledge of a bombing plan when he was informed of it by the American authorities. *Id.*, Enclosure (3) at 1. * * * Absent other evidence,[36] it would

[36] It is true that Exhibit R19 to the Kurnaz Factual Return does assert that * * * and the respondents urge this Court to uphold the detention of any petitioner, including Mr. Kurnaz, as long as "some evidence" exists to

appear that the government is indefinitely holding the detainee—possibly for life—solely because of his contacts with individuals or organizations tied to terrorism and not because of any terrorist activities that the detainee aided, abetted, or undertook himself. Such detention, even if found to be authorized by the AUMF, would be a violation of due process. Accordingly, the detainee is entitled to fully litigate the factual basis for his detention in these habeas proceedings and to have a fair opportunity to prove that he is being detained on improper grounds.

Similar defects might also exist with respect to the detention of Jamil El-Banna, a petitioner in *El-Banna v. Bush*, 04-CV-1144 (RWR). At the CSRT proceedings, the tribunal concluded that the detainee was an "enemy combatant" on the ground that he was "part of or supporting Al Qaida forces." Respondents' *In Camera* Factual Return to Petition for Writ of Habeas Corpus by Petitioner Jamil El-Banna (hereinafter "El-Banna Factual Return"), filed December 17, 2004, Enclosure (1) at 5. The CSRT reached this conclusion notwithstanding the Personal Representative's position that it was unsupported by the record before the tribunal. *See* October 16, 2004 Memorandum of James R. Crisfield Jr., attached to the El-Banna Factual Return. During the CSRT proceedings, the tribunal rejected two grounds cited by the Recorder in support of the detainee's "enemy combatant" status. First, although the detainee was alleged to have been indicted by a

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support a conclusion that he actively participated in terrorist activities. Motion to Dismiss at 47-51. *Hamdi*, however, holds that the "some evidence" standard cannot be applied where the detainee was not given an opportunity to challenge the evidence in an administrative proceeding, 124 S. Ct. at 2651, and Mr. Kurnaz was never provided access to Exhibit R19. Additionally, in resolving a motion to dismiss, the Court must accept as true the petitioner's allegations and must interpret the evidence in the record in the light most favorable to the nonmoving party. Because Exhibit R19 * * * the Court cannot at this stage of the litigation give the document the weight the CSRT afforded it.

Spanish National High Court Judge for membership in a terrorist organization, *id.*, Enclosure (3) at 2, the tribunal did not find any evidence relating to that indictment "helpful in establishing the detainee"s association with Al Qaida." *Id.*, Enclosure (1) at 4.* * * Second, although the detainee was alleged to have attempted "to board an airplane with equipment that resembled a homemade electronic device," *id.*, Enclosure (3) at 3,

* * *

Even accepting these factual conclusions as true, a serious legal question exists as to whether such activities would be sufficient to detain the petitioner at Guantanamo Bay indefinitely without formally charging him with a crime. *See Hamdi*, 124 S. Ct. at 2640 ("The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.") and at 2642 ("If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [that the AUMF allows indefinite detention] may unravel."). In any event, however, final resolution of that question must be left for another day because at this stage of the proceedings, the Court must interpret the facts in the light most favorable to the party opposing a motion to dismiss. Under that approach, evidence in the record can be fairly interpreted to conclude that the petitioner is being detained indefinitely not because

* * *

It may well turn out that after the detainee is given a fair opportunity to challenge his detention in a habeas proceeding the legality of his detention as an "enemy combatant" will be upheld and he will continue to be held at Guantanamo Bay until the end of the war on terrorism or until the government determines he no longer poses a threat to U.S. security. It is also possible, however, that once given a fair opportunity to

litigate his case, the detainee will establish that he is being indefinitely detained not because of anything he has done and not to prevent his return to any "battlefield," metaphorical or otherwise, but simply because * * * such detention is not permissible * * * and the respondents' motion to dismiss must therefore be denied.

This concludes the Court's analysis of the due process issues arising from the respondents' motion to dismiss. Nothing written above should be interpreted to require the immediate release of any detainee, nor should the conclusions reached be considered to have fully resolved whether or not sufficient evidence exists to support the continued detention of any petitioner. The respondents' motion to dismiss asserted that no evidence exists and that the petitioners could make no factual allegations which, if taken as true, would permit the litigation of these habeas cases to proceed further. For the reasons stated above, the Court has concluded otherwise. The Court, however, has not addressed all arguments made by the petitioners in opposition to the respondents' motion to dismiss, and it maybe that the CSRT procedures violate due process requirements for additional reasons not addressed in this Memorandum Opinion. In any event, and as *Hamdi* acknowledged, in the absence of military tribunal proceedings that comport with constitutional due process requirements, it is the obligation of the court receiving a habeas petition to provide the petitioner with a fair opportunity to challenge the government's factual basis for his detention. *Id.* at 2651-52. Accordingly, the accompanying Order requests input from counsel regarding how these cases should proceed in light of this Memorandum Opinion.

D. CLAIMS BASED ON THE GENEVA CONVENTIONS

The petitioners in all of the above captioned cases except *Al Odah v. United States*, 02CV-0828, have also asserted claims based on the Geneva Conventions, which regulate the

treatment of certain prisoners of war and civilians. The respondents contend that all Geneva Convention claims filed by the petitioners must be dismissed because Congress has not enacted any separate legislation specifically granting individuals the right to file private lawsuits based on the Conventions and because the Conventions are not "self-executing," meaning they do not by themselves create such a private right of action. Motion to Dismiss at 68-71. In the alternative, the respondents argue that even if the Geneva Conventions are self-executing, they do not apply to members of al Qaeda because that international terrorist organization is not a state party to the Conventions. *Id.* at 70 n.80. Finally, although respondents concede that Afghanistan is a state party to the Conventions and adroit that the Geneva Conventions apply to Taliban detainees, they emphasize that President Bush has determined that Taliban fighters are not entitled to prisoner of war status under the Third Geneva Convention and contend that this decision is the final word on the matter. *Id.*

The Constitution provides that "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Unless Congress enacts authorizing legislation, however, an individual may seek to enforce a treaty provision only if the treaty expressly or impliedly grants such a right. *See Head Money Cases*, 112 U.S. 580, 598-99 (1884). If a treaty does not create an express right of private enforcement, an implied right might be found by examining the treaty as a whole. *See Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976).

The Third and Fourth Geneva Conventions do not expressly grant private rights of action, and whether they impliedly create such rights has never been definitively resolved by the D.C. Circuit.[37] The Court of Appeals is currently re-

[37] The closest the Court of Appeals came to ruling on the issue was the case of *Tel-Oren v. Libyan Arab Republic*, 726 F.2d. 774 (D.C. Cir. 1984), a suit brought by victims of a brutal attack in Israel by the Palestin-

viewing the matter in the appeal of *Hamdan v. Rumsfeld*, 344 F. Supp.2d 152 (D.D.C. 2004), but until that court issues a definitive ruling,[38] this Court must make its own determination. After reviewing *Hamdan* and the briefs filed by petitioners and respondents in the instant cases, the Court concludes that the Conventions are self-executing and adopts the following reasoning provided by Judge Robertson:

> Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty.

Id. at 165.

Although the Court rejects the primary basis argued by the respondents for dismissal of claims based on the Geneva Conventions, it does accept one of the alternative grounds put

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ian Liberation Organization. The main issue on appeal was whether the District Court correctly ruled that there was no subject-matter jurisdiction to hear the case, and although the three judge panel ultimately affirmed the lower court's decision, each judge relied on a separate rationale and no judge joined any other judge's opinion. In reaching his own conclusion, Judge Robert Bork determined that the Third Geneva Convention was not self-executing. *Id.* at 808-09. The other two judges on the panel did not address the issue, however, and the matter remains unsettled as of this date.

[38] Oral argument on the respondents appeal in *Hamdan* is currently scheduled for March 8, 2005.

forth in their motion, namely that the Geneva Conventions do not apply to al Qaeda. Article 2 of the Third and Fourth Geneva Conventions provides, "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Clearly, al Qaeda is not a "High Contracting Party" to the Conventions, and thus individuals detained on the ground that they are members of that terrorist organization are not entitled to the protections of the treaties.

This does not end the analysis for purposes of resolving the respondents' motion to dismiss, however, because some of the petitioners in the above-captioned cases are being detained either solely because they were Taliban fighters or because they were associated with both the Taliban and al Qaeda. Significantly, the respondents concede that the Geneva Conventions apply to the Taliban detainees in light of the fact that Afghanistan is a High Contracting Party to the Conventions. Motion to Dismiss at 70-71 n.80 (*citing* White House Fact Sheet (Feb. 7, 2002), available at http://www.whitehouse.gov/news/releases/2002/02120020207-13.html). They argue in their motion to dismiss, however, that notwithstanding the application of the Third Geneva Convention to Taliban detainees, the treaty does not *protect* Taliban detainees because the President has declared that no Taliban fighter is a "prisoner of war" as defined by the Convention. *Id.* The respondents' argument in this regard must be rejected, however, for the Third Geneva Convention does not permit the determination of prisoner of war status in such a conclusory fashion.

Article 4 of the Third Geneva. Convention defines who is considered a "prisoner of war" under the treaty. Paragraph (1) provides that the term "prisoners of war" includes "[m]embers of the armed forces of a Party to the conflict, as

well as members of militias or volunteer corps forming part of such armed forces." As provided in Paragraph (2), the definition of "prisoners of war" also includes "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements," but only if they fulfill the following conditions: "(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war." If there is any doubt as to whether individuals satisfy the Article 4 prerequisites, Article 5 entitles them to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal." Army Regulation 190-8 created the rules for the "competent tribunal" referenced in Article 5 of the Third Geneva Convention, and the CSRT was established in accordance with that provision. *See* Army Regulation 190-8 § 1-1.b, Motion to Dismiss at 32.

Nothing in the Convention itself or in Army Regulation 190-8 authorizes the President of the United States to rule by fiat that an entire group of fighters covered by the Third Geneva Convention falls outside of the Article 4 definitions of "prisoners of war." To the contrary, and as Judge Robertson ruled in *Hamdan*, the President's broad characterization of how the Taliban generally fought the war in Afghanistan cannot substitute for an Article 5 tribunal's determination on an individualized basis of whether a particular fighter complied with the laws of war or otherwise falls within an exception denying him prisoner of war status. 344 F. Supp.2d at 161-62. Clearly, had an appropriate determination been properly made by an Article 5 tribunal that a petitioner was not a prisoner of war, that petitioner's claims based on the Third Geneva Convention could not survive the respondents' motion to dismiss. But although numerous petitioners in the above-captioned cases were found by the CSRT to have been Taliban fighters, nowhere do the CSRT records for many of

those petitioners reveal specific findings that they committed some particular act or failed to satisfy some defined prerequisite entitling the respondents to deprive them of prisoner of war status.[39] Accordingly, the Court denies that portion of the respondents' motion to dismiss addressing the Geneva Convention claims of those petitioners who were found to be Zaliban fighters but who were not specifically determined to be excluded from prisoner of war status by a competent Article 5 tribunal.

E. DISMISSAL OF REMAINING CLAIMS

Upon review of the remaining causes of action asserted by the various petitioners in these cases, the Court concludes that the respondents are entitled to dismissal of the claims not addressed in the preceding sections of this Memorandum Opinion. The Court agrees with the respondents that claims based on the Sixth, Eighth, and Fourteenth Amendments to the Constitution are not sustainable because the Sixth Amendment applies only to criminal proceedings, because the Eighth Amendment applies only after an individual is convicted of a crime, and because the Fourteenth Amendment applies only to the states and not to the federal government. In addition, any claims based on the Suspension Clause, U.S. Const. art. I, § 9, cl. 2, must be dismissed because the habeas jurisdiction of this court has not been suspended. Except as discussed in part II.D above regarding the Geneva Conventions, the Court agrees that the remaining treaty-based claims and the claim based on Army Regulation 190-8 asserted by the petitioners should be dismissed primarily for the reasons stated by the

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[39] *See, e.g.*, * * * This list provides only examples of petitioners for whom the CSRT did not make a full Article 5 type inquiry regarding prisoner of war status. There may be additional petitioners who fought for the Taliban and who were not given individualized determinations as to their prisoner of war status. Absence from this list should not be interpreted to imply that a petitioner can no longer assert his Geneva Convention claims in this habeas litigation.

respondents in their motion to dismiss. See Motion to Dismiss at 71-72. The Court also agrees with the reasoning of Judge Kollar-Kotelly in her original *Rasul* decision and with Judge Randolph's concurrence in the *Al Odah* appeal that the doctrine of sovereign immunity bars claims based on the Alien Tort Claims Act and that the general waiver of sovereign immunity contained in the Administrative Procedure Act is inapplicable because of the "military authority" exception in 5 U.S.C. § 701(b)(1)(G). *Al Odah*, 321 F.3d at 1149-50 (Randolph, J. concurring); *Rasul*, 215 F. Supp.2d at 64 n.11. Finally, having found that all detainees possess Fifth Amendment due process rights and that some detainees possibly possess rights under the Geneva Conventions, it is unnecessary to look to customary international law to resolve the petitioners' claims. *See The Paquete Habana*, 175 U.S. 677, 699 (1900) ("where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations").

III. CONCLUSION

For the reasons provided above, the Court holds that the petitioners have stated valid claims under the Fifth Amendment and that the CSRT procedures are unconstitutional for failing to comport with the requirements of due process. Additionally, the Court holds that Taliban fighters who have not been specifically determined to be excluded from prisoner of war status by a competent Article 5 tribunal have also stated valid claims under the Third Geneva Convention. Finally, the Court concludes that the remaining claims of the petitioners must be denied. Accordingly, this Memorandum Opinion is accompanied by a separate Order denying in part and granting in part the respondents' Motion to Dismiss or for Judgment as a Matter of Law.

This Judge began her participation as the coordinator of these cases on August 17, 2004, and her involvement will soon be ending. These cases have always remained before the

original Judges assigned to them and only particular issues or motions were referred to this Judge for resolution. Therefore, there will be no need to transfer the cases back to those Judges. In the interest of the effective management of this litigation, however, the accompanying Order requests briefing from counsel on an expedited basis regarding their views as to how these cases should proceed in light of this Memorandum Opinion and this Judge's imminent departure.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

January 31, 2005

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action Nos.
02-CV-0299 (CKK), 02-CV-0828 (CKK),
02-CV-1130 (CKK), 04-CV-1135 (ESH),
04-CV-1136 (JDB), 04-CV-1137 (RMC),
04-CV-1144 (RWR), 04-CV-1164 (RBW),
04-CV-1194 (HHK), 04-CV-1227 (RBW),
04-CV-1254 (HHK)

In re Guantanamo Detainee Cases

ORDER DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW AND REQUESTING BRIEFING ON THE FUTURE PROCEEDINGS IN THESE CASES

For reasons stated in the Memorandum Opinion issued this date, it is hereby

ORDERED that the respondents' Motion to Dismiss or for Judgment as a Matter of Law is denied in part and granted in part. It is

FURTHER ORDERED that counsel for the petitioners and for the respondents shall file on or before 12:00 noon, Thursday, February 3, 2005, submissions regarding how they believe these cases should proceed in light of the Memorandum Opinion and this Judge's imminent departure.

IT IS SO ORDERED.

January 31, 2005

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

APPENDIX E

CONSTITUTION OF THE UNITED STATES

ARTICLE I, SECTION 9, CLAUSE 2

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

United States Public Laws
107th Congress—First Session
Convening January, 2001
Authorization for Use of Military Force

Joint Resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force".

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS. —Nothing in this resolution supercedes any requirement of the War Powers Resolution.

(Pub.L. 107-40, Sept. 18, 2001, 115 Stat. 224.)

APPENDIX G

United States Public Laws
109th Congress—First Session
Convening January 7, 2005
Detainee Treatment Act of 2005

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

(a) SUBMITTAL OF PROCEDURES FOR STATUS REVIEW OF DETAINEES AT GUANTANAMO BAY, CUBA, AND IN AFGHANISTAN AND IRAQ.—

(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services and the Committee on the Judiciary of the Senate and the Committee on Armed Services and the Committee on the Judiciary of the House of Representatives a report setting forth—

(A) the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay or to provide an annual review to determine the need to continue to detain an alien who is a detainee; and

(B) the procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in the custody or under the physical control of the Department of Defense in those countries.

(2) DESIGNATED CIVILIAN OFFICIAL.—The procedures submitted to Congress pursuant to paragraph (1)(A) shall ensure that the official of the Department of Defense who is designated by the President or Secretary

of Defense to be the final review authority within the Department of Defense with respect to decisions of any such tribunal or board (referred to as the "Designated Civilian Official") shall be a civilian officer of the Department of Defense holding an office to which appointments are required by law to be made by the President, by and with the advice and consent of the Senate.

(3) CONSIDERATION OF NEW EVIDENCE.—The procedures submitted under paragraph (1)(A) shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee.

(b) CONSIDERATION OF STATEMENTS DERIVED WITH COERCION.—

(1) ASSESSMENT.—The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess—

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) APPLICABILITY.—Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

(c) REPORT ON MODIFICATION OF PROCEDURES. —The Secretary of Defense shall submit to the committees specified in subsection (a)(1) a report on any modification of the procedures submitted under subsection

(a). Any such report shall be submitted not later than 60 days before the date on which such modification goes into effect.

(d) ANNUAL REPORT.—

(1) REPORT REQUIRED.—The Secretary of Defense shall submit to Congress an annual report on the annual review process for aliens in the custody of the Department of Defense outside the United States. Each such report shall be submitted in unclassified form, with a classified annex, if necessary. The report shall be submitted not later than December 31 each year.

(2) ELEMENTS OF REPORT.—Each such report shall include the following with respect to the year covered by the report:

(A) The number of detainees whose status was reviewed.

(B) The procedures used at each location.

(e) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS.—

(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

"(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.".

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and proce-

dures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW.—Review under this paragraph—

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) LIMITATION ON APPEALS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien—

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) RESPONDENT.—The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

(f) CONSTRUCTION.—Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.

(g) UNITED STATES DEFINED.—For purposes of this section, the term "United States", when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba.

(h) EFFECTIVE DATE.—

(1) IN GENERAL.—This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

(Pub.L. 109-148, Dec. 30, 2005, 119 Stat. 2740.)

APPENDIX H

United States Public Laws
109th Congress—Second Session
Convening January 7, 2005
Military Commissions Act of 2006

SEC. 3. MILITARY COMMISSIONS.

(a) MILITARY COMMISSIONS.—

(1) IN GENERAL.—Subtitle A of title 10, United States Code, is amended by inserting after chapter 47 the following new chapter:

"CHAPTER 47A—MILITARY COMMISSIONS

. . .

"§ 950j. Finality or proceedings, findings, and sentences

. . .

"(b) PROVISIONS OF CHAPTER SOLE BASIS FOR REVIEW OF MILITARY COMMISSION PROCEDURES AND ACTIONS.—Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

SEC. 7. HABEAS CORPUS MATTERS.

(a) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109-148 (119 Stat. 2742) and the subsection (e) added by added by section 1405(e)(1) of Public Law 109-163 (119 Stat. 3477) and inserting the following new subsection (e):

> "(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> "(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

(Pub.L. 109-366, Oct. 17, 2006, 120 Stat. 2600.)

APPENDIX I

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASINGTON, DC 20301-1010

[LOGO]

MEMORANDUM FOR THE SECRETARY OF THE NAVY

SUBJECT: Order Establishing Combatant Status Review Tribunal

This Order applies only to foreign nationals held as enemy combatants in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba ("detainees").

a. Enemy Combatant. For purposes of this Order, the term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.

b. Notice. Within ten days after the date of this Order, all detainees shall be notified of the opportunity to contest designation as an enemy combatant in the proceeding described herein, of the opportunity to consult with and be assisted by a personal representative as described in paragraph (c), and of the right to seek a writ of habeas corpus in the courts of the United States.

c. Personal Representative. Each detainee shall be assigned a military officer, with the appropriate security clearance, as a personal representative for the purpose of assisting the detainee in connection with the review process described

herein. The personal representative shall be afforded the opportunity to review any reasonably available information in the possession of the Department of Defense that may be relevant to a determination of the detainee's designation as an enemy combatant, including any records, determinations, or reports *generated* in *connection* with earlier determinations or reviews, and to consult with the detainee concerning that designation and any challenge thereto. The personal representative may share any information with the detainee, except for classified information, and may participate in the Tribunal proceedings as provided in paragraph (g)(4).

d. Tribunals. Within 30 days after the detainee's personal representative has been afforded the opportunity to review the reasonably available information in the possession of the Department of Defense and had an opportunity to consult with the detainee, a Tribunal shall be convened to review the detainee's status as an enemy combatant.

e. Composition of Tribunal. A Tribunal shall be composed of three neutral commissioned officers of the U.S. Armed Forces, each of whom possesses the appropriate security clearance and none of whom was involved in the apprehension, detention, interrogation, or previous determination of status of the detainee. One of the members shall be a judge advocate. The senior member *(in* the grade of 0-5 and above) shall serve as President of the Tribunal. Another nonvoting officer, preferably a judge advocate, shall serve as the Recorder and shall not be a member of the Tribunal.

f. Convening Authority. The Convening Authority shall be designated by the Secretary of the Navy. The Convening Authority shall appoint each Tribunal and its members, and a personal representative for *each detainee.* The *Secretary of* the Navy, with the concurrence of the General Counsel of the Department of Defense, may issue instructions to implement this Order.

g. Procedures.

(1) The Recorder shall provide the detainee in advance of the proceedings with notice of the unclassified factual basis for the detainee's designation as an enemy combatant.

(2) Members of the Tribunal and the Recorder shall be sworn. The Recorder shall be sworn first by the President of the Tribunal. The Recorder will then administer an oath, to faithfully and impartially perform their duties, to all members of the Tribunal to include the President.

(3) The record in each case shall consist of all the documentary evidence presented to the Tribunal, the Recorder's summary of all witness testimony, a written report of the Tribunal's decision, and a recording of the proceedings (except proceedings involving deliberation and voting by the members), which shall be preserved.

(4) The detainee shall be allowed to attend all proceedings, except for proceedings involving deliberation and voting by the members or testimony and other matters that would compromise national security if held in the presence of the detainee. The detainee's personal representative shall be allowed to attend all proceedings, except for proceedings invoking deliberation and voting by the members of the Tribunal.

(5) The detainee shall be provided with an interpreter, if necessary.

(6) The detainee shall be advised at the beginning of the hearing of the nature of the proceedings and of the procedures accorded him in connection with the hearing.

(7) The Tribunal, through its Recorder, shall have access to and consider any reasonably available information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any reasonably

available records, determinations, or reports generated in connection therewith.

(8) The detainee shall be allowed to call witnesses if reasonably, and to question those witnesses called by the Tribunal. The Tribunal shall determine the reasonable availability of witnesses. If such witnesses are from within the U.S. Armed Forces they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. *In* the case of witnesses who are not reasonably available, written statements, preferably sworn, may be submitted and considered as evidence.

(9) The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances. The Tribunal does not have the authority to declassify or change the classification of any national security information it reviews.

(10) The detainee shall have a right to testify or otherwise address the Tribunal in oral or written form, and to introduce relevant documentary evidence.

(11) The detainee may not be compelled to testify before the Tribunal.

(12) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine in closed session by majority vote whether the detainee is properly detained as an enemy combatant. Preponderance of evidence shall be the standard used in reaching this determination, but there shall be a rebuttable presumption in favor of the Government's evidence.

(13) The President of the Tribunal shall, without regard to any other provision of this Order, have authority and the duty to ensure that all proceedings of or in relation to the Tribunal under this Order shall comply with Executive Order 12958 regarding national security information.

h. The Record. The Recorder shall, to the maximum extent practicable, prepare the record of the Tribunal within three working days of the announcement of the Tribunal's decision. The record shall include those items described in paragraph (g)(3) above. The record will then be forwarded to the Staff Judge Advocate for the Convening Authority, who shall review the record for legal sufficiency and make a recommendation to the Convening Authority. The Convening Authority shall review the Tribunal's decision and, in accordance with this Order *and* any implementing instructions issued by the Secretary of the Navy, may return the record to the Tribunal for further proceedings or approve the decision and take appropriate action.

i. Non-Enemy Combatant Determination. If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, the written report of its decision shall he forwarded directly to the Secretary of Defense or his designee. The Secretary or his designee shall so advise the Secretary of State, in order to permit the Secretary of State to coordinate the transfer of the detainee for release to the detainee's country of citizenship or other disposition consistent with domestic and international obligations and the foreign policy of the United States.

j. This Order is intended solely to improve management within the Department of Defense concerning its detention of enemy combatants at Guantanamo Bay Naval Base. Cuba, and is not intended to,. and does not, create any ri[g]ht or benefit, substantive or procedural, enforceable at law, in equity, or otherwise by any party against the United States, as

departments, agencies, instrumentalities or entities, its officers employees or agents, or any other person.

k. Nothing in this Order shall be construed to limit, impair, or otherwise affect the constitutional authority of the President as Commander in Chief or any authority granted by statute to the President or the Secretary of Defense.

This Order is effective immediately.

/s/ Paul [Illegible]

APPENDIX J

THE SECRETARY OF THE NAVY
WASHINGTON, D.C. 20350-1000

[LOGO] 29 July 2004

MEMORANDUM FOR DISTRIBUTION

Subj: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba

Ref: (a) Deputy Secretary of Defense Order of July 7, 2004
(b) Convening Authority Appointment Letter of July 9, 2004

Encl: (1) Combatant Status Review Tribunal Process
(2) Recorder Qualifications, Roles and Responsibilities
(3) Personal Representative Qualifications, Roles and Responsibilities
(4) Combatant Status Review Tribunal Notice to Detainees
(5) Sample Detainee Election Form
(6) Sample Nomination Questionnaire
(7) Sample Appointment Letter for Combatant Status Review Tribunal Panel
(8) Combatant Status Review Tribunal Hearing Guide
(9) Combatant Status Review Tribunal Decision Report Cover Sheet

1. Introduction

By reference (a), the Secretary of Defense has established a Combatant Status Review Tribunal (CSRT) process to determine, in a fact-based proceeding, whether the individuals detained by the Department of Defense at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation. The Secretary of the Navy has been appointed to operate and oversee this process.

The Combatant Status Review Tribunal process provides a detainee: the assistance of a Personal Representative; an interpreter if necessary; an opportunity to review unclassified info oration relating to the basis for his detention; the opportunity to appear personally to present reasonably available information relevant to why he should not be classified as an enemy combatant; the opportunity to question witnesses testifying at the Tribunal; and, to the extent they are

Subj: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba reasonably available, the opportunity to call witnesses on his behalf.

2. Authority

The Combatant Status Review Tribunal process was established by Deputy Secretary of Defense Order dated July 7, 2004 (reference (a)), which designated the undersigned to operate and oversee the Combatant Status Review Tribunal process. The Tribunals will be governed by the provisions of reference (a) and this implementing directive, which sets out procedures for Tribunals and establishes the position of Director, Combatant Status Review Tribunals. Reference (b) designates the Director, CSRT, as the convening authority for the Tribunal process.

3. Implementing Process

The Combatant Status Review Tribunal Process is set forth in enclosure (1). Enclosures (2) and (3) set forth detailed descriptions of the roles and responsibilities of the Recorder and Personal Representative respectively. Enclosure (4) is a Notice to detainees regarding the CSRT process. Enclosure (5) is a Sample Detainee Election Form. Enclosure (6) is a Sample Nominee Questionnaire for approval of Tribunal members, Recorders, and Personal Representatives. Enclosure (7) is an Appointment Letter that will be signed by the Director of CSRT as the convening authority. Enclosure (8) is

a CSRT Hearing Guide. Tribunal decisions will be reported to the convening authority by means of enclosure (9). This implementing directive is subject to revision at any time.

/s/ [Illegible]

CC:
Secretary of State
Secretary of Defense
Attorney General
Secretary of Homeland Security
Director, Central Intelligence. Agency
Assistant to the President for National Security Affairs
Counsel to the President
Deputy Secretary of Defense
Secretary of the Army
Secretary of the Navy
Secretary of the Air Force
Chairman of the Joint Chiefs of Staff
Director, Federal Bureau of Investigation
Director of Defense Agencies
Director, DOD Office of Detainee Affairs

Combatant Status Review Tribunal Process

A. Organization

Combatant Status Review Tribunals (CSRT) will be administered by the Director, Combatant Status Review Tribunals. The Director will staff and structure the Tribunal organization to facilitate its operation. The CSRT staff will schedule Tribunal proceedings, provide for interpreter services, provide legal advice to the Director and to Tribunal panels, provide clerical assistance and other administrative support, ensure information security, and coordinate with other agencies as appropriate.

B. Purpose and Function

This process will provide a non-adversarial proceeding to determine whether each detainee in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba, meets the criteria to be designated as an enemy combatant, defined in reference (a) as follows:

> An "enemy combatant" for purposes of this order shall mean an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Each detainee whose status will be reviewed by a Tribunal has previously been determined, since capture, to be an enemy combatant through multiple levels of review by military officers and officials of the Department of Defense.

The Director, CSRT, shall convene Tribunals pursuant to this implementing directive to conduct such proceedings as necessary to make a written assessment as to each detainee's status as an enemy combatant. Each Tribunal shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant.

Adoption of the procedures outlined in this directive is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

C. Combatant Status Review Tribunal Structure

(1) Each Tribunal shall be composed of a panel of three neutral commissioned officers of the U.S. Armed

Forces convened to make determinations of enemy combatant status pursuant to this implementing directive. Each of the officers shall possess the appropriate security clearance and none of the officers appointed shall have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The senior member of each Tribunal shall be an officer serving in the grade of 0-6 and shall be its President. The other members of the Tribunal shall be officers in the grade of 0-4 and above. One of the officers appointed to the Tribunal shall be a judge advocate. All Tribunal members have an equal vote as to a detainee's enemy combatant status.

(2) Recorder. Each Tribunal shall have a commissioned officer serving in the grade of O3 or above, preferably a judge advocate, appointed by the Director, CSRT, to obtain and present all relevant evidence to the Tribunal and to cause a record to be made of the proceedings. The Recorder shall have an appropriate security clearance and shall have no vote. The Recorder shall not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The role and responsibilities of the Recorder are set forth in enclosure (2).

(3) Personal Representative. Each Tribunal shall have a commissioned officer appointed by the Director, CSRT, to assist the detainee in reviewing all relevant unclassified information, in preparing and presenting information, and in questioning witnesses at the CSRT. The Personal Representative shall be an officer in the grade of 0-4 or above, shall have the appropriate security clearance, shall not be a judge advocate, and shall have no vote. The Personal Representative shall

not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The role and responsibilities of the Personal Representative are set forth in enclosure (3).

(4) Legal Advisor. The Director, CSRT, shall appoint a judge advocate officer as the Legal Advisor to the Tribunal process. The Legal Advisor shall be available in person, telephonically, or by other means, to each Tribunal as an advisor on legal, evidentiary, procedural or other matters. In addition, the Legal Advisor shall be responsible for reviewing each Tribunal decision for legal sufficiency. The Legal Advisor shall have an appropriate security clearance and shall have no vote. The Legal Advisor shall also not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process.

(5) Interpreter. If needed, each Tribunal will have an interpreter appointed by the President of the Tribunal who shall be competent in English and a language understood by the detainee. The interpreter shall have no vote and will have an appropriate security clearance.

D. Handling of Classified Material

(1) All parties shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Tribunal, Recorder and Personal Representative shall coordinate with an Information Security Officer in the handling and safeguarding of classified material before, during and after the Tribunal proceeding.

(2) The Director, CSRT, and the Tribunal President have the authority and duty to ensure that all proceedings of, or in relation to, a Tribunal under this Order shall

comply with Executive Order 12958 regarding national security information in all respects. Classified information may be used in the CSRT process with the concurrence of the originating agency. Classified information for which the originating agency declines to authorize for use in the CSRT process is not reasonably available. For any information not reasonably available, a substitute or certification will be requested from the originating agency as cited in paragraph E (3)(a) below.

(3) The Director, CSRT, the CSRT staff, and the participants in the CSRT process do not have the authority to declassify or change the classification of any classified information.

E. Combatant Status Review Tribunal Authority

The Tribunal is authorized to:

(1) Determine the mental and physical capacity of the detainee to participate in the hearing. This determination is intended to be the perception of a layperson, not a medical or mental health professional. The Tribunal may direct a medical or mental health evaluation of a detainee, if deemed appropriate. If a detainee is deemed physically or mentally unable to participate in the CSRT process, that detainee's case will be held as a Tribunal in which the detainee elected not to participate. The Tribunal President shall ensure that the circumstances of the detainee's absence are noted in the record.

(2) Order U.S. military witnesses to appear and to request the appearance of civilian witnesses it in the judgment of the Tribunal President those witnesses are reasonably available as defined in paragraph G (9) of this enclosure.

(3) Request the production of such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings (cumulatively called hereinafter the "Government Information").

(a) For any relevant information not provided in response to a Tribunal's request, the agency holding the information shall provide either an acceptable substitute for the information requested or a certification to the Tribunal that none of the withheld information would support a determination that the detainee is not an enemy combatant. Acceptable substitutes may include an unclassified or, if not possible, a lesser classified, summary of the information; or a statement as to the relevant facts the information would tend to prove.

(4) Require each witness (other than the detainee) to testify under oath. The detainee has the option of testifying under oath or unworn. Forms of the oath for Muslim and non-Muslim witnesses are in the Tribunal Hearing Guide (enclosure (8)). The Tribunal Recorder will administer the oath.

F. The Detainee's Participation in the CSRT Process

(1) The detainee may elect to participate in a Combatant Status Review Tribunal or may waive participation in the process. Such waiver shall be submitted to the Tribunal in writing by the detainee's Personal Representative and must be made after the Personal Repre-

sentative has explained the Tribunal process and the opportunity of the detainee to contest this enemy combatant status. The waiver can be either an affirmative statement that the detainee declines to participate or can be inferred by the Personal Representative from the detainee's silence or actions when the Personal Representative explains the CSRT process to the detainee. The detainee's election shall be noted by the Personal Representative on enclosure (5).

(2) If a detainee waives participation in the Tribunal process, the Tribunal shall still review the detainee's status without requiring the presence of the detainee.

(3) A detainee who desires to participate in the Tribunal process shall be allowed to attend all Tribunal proceedings except for proceedings involving deliberation and voting by the members and testimony or other matters that would compromise national security if held in the presence of the detainee.

(4) The detainee may not be compelled to testify or answer questions before the Tribunal other than to confirm his identity.

(5) The detainee shall not be represented by legal counsel but will be aided by a Personal Representative who may, upon the detainee's election, assist the detainee at the Tribunal. He shall be provided with an interpreter during the Tribunal hearing if necessary.

(6) The detainee may present evidence to the Tribunal, including the testimony of witnesses who are reasonably available and whose testimony is considered by the Tribunal to be relevant. Evidence on the detainee's behalf (other than his own testimony, if offered) may be presented in documentary form and through written statements, preferably sworn.

(7) The detainee may present oral testimony to the Tribunal and may elect to do so under oath or affirmation or as unsworn testimony. If the detainee testifies, either under oath or unsworn, he may be questioned by the Recorder, Personal Representative, or Tribunal members, but may not be compelled to answer questions before the Tribunal.

(8) The detainee's Personal Representative shall be afforded the opportunity to review the Government Information, and to consult with the detainee concerning his status as an enemy combatant and any challenge thereto. The Personal Representative may share the unclassified portion of the Government Information with the detainee.

(9) The detainee shall be advised of the foregoing by his Personal Representative before the Tribunal is convened, and by the Tribunal President at the beginning of the hearing.

G. Tribunal Procedures

(1) By July 17, 2004, the convening authority was required to notify each detainee of the opportunity to contest his status as an enemy combatant in the Combatant Status Review Tribunal process, the opportunity to consult with and be assisted by a Personal Representative, and of the jurisdiction of the courts of the United States to entertain a habeas corpus petition filed on the detainee's behalf. The English language version of this Notice to Detainees is at enclosure (4). All detainees were so notified July 12-14, 2004.

(2) An officer appointed as a Personal Representative will meet with the detainee and, through an interpreter if necessary, explain the nature of the CSRT process to the detainee, explain his opportunity to personally appear before the Tribunal and present evidence, and

assist the detainee in collecting relevant and reasonably available information and in preparing for and presenting information to the CSRT.

(3) The Personal Representative will have the detainee make an election as to whether he wants to participate in the Tribunal process. Enclosure (5) is a Detainee Election Form. If the detainee elects not to participate, or by his silence or actions indicates that he does not want to participate, the Personal Representative will note this on the election form and this detainee will not be required to appear at his Tribunal hearing. The Director, CSRT, as convening authority, shall appoint a Tribunal as described in paragraph C (1) of this enclosure for all detainees after reviewing Nomination Questionnaires (enclosure (6)) and approving Tribunal panel members. Enclosure (7) is a sample Appointment Letter.

(4) The Director, CSRT, will schedule a Tribunal hearing for a detainee within 30 days after the detainee's Personal Representative has reviewed the Government Information, had an opportunity to consult with the detainee, and notified the detainee of his opportunity to contest his status, even if the detainee declines to participate as set forth above. The Personal Representative will submit a completed Detainee Election Form to the Director, CSRT, or his designee when the Personal Representative has completed the actions above. The 30-day period to schedule a Tribunal will commence upon receipt of this form.

(5) Once the Director, CSRT, has scheduled a Tribunal, the President of the assigned Tribunal panel may postpone the Tribunal for good cause shown to provide the detainee or his Personal Representative a reasonable time to acquire evidence deemed relevant and neces-

sary to the Tribunal's decision, or to accommodate military exigencies as presented by the Recorder.

(6) All Tribunal sessions except those relating to deliberation or voting shall be recorded on audiotape. Tribunal sessions where classified information is discussed shall be recorded on separate and properly marked audiotapes.

(7) Admissibility of Evidence. The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issues before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances.

(8) Control of Case. The President of the Tribunal is authorized to order the removal of any person from the hearing if that person is disruptive, uncooperative, or otherwise interferes with the Tribunal proceedings following a warning. In the case of the removal of the detainee from the Tribunal hearing, the detainee's Personal Representative shall continue in his role of assisting the detainee in the hearing.

(9) Availability of Witnesses. The President of the Tribunal is the decision authority on reasonable availability of witnesses.

(a) If such witnesses are from within the U.S. Armed Forces, they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would adversely affect combat or support operations.

(b) If such witnesses are not from within the U.S. Armed Forces, they shall not be considered reason-

ably available if they decline properly made requests to appear at a hearing, if they cannot be contacted following reasonable efforts by the CSRT stag or if security considerations preclude their presence at a hearing. Non-U.S. Government witnesses will appear before the Tribunal at their own expense. Payment of expenses for U.S. Government witnesses will be coordinated by the CSRT staff and the witness's organization.

(c) For any witnesses who do not appear at the hearing, the President of the Tribunal may allow introduction of evidence by other means such as e-mail, fax copies, and telephonic or video-telephonic testimony. Since either video-telephonic or telephonic testimony is equivalent to in-person testimony, the witness shall be placed under oath and is subject to questioning by the Tribunal.

(10) CSRT Determinations on Availability of Evidence. If the detainee requests witnesses or evidence deemed not reasonably available, the President of the Tribunal shall document the basis for that decision; to include, for witnesses, efforts undertaken to procure the presence of the witness and alternatives considered or used in place of that witness's in-person testimony.

(11) Burden of Proof. Tribunals shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant. There is a rebuttable presumption that the Government Evidence, as defined in paragraph H (4) herein, submitted by the Recorder to support a determination that the detainee is an enemy combatant, is genuine and accurate.

(12) Voting. The decisions of the Tribunal shall be determined by a majority of the voting members of the

Tribunal. A dissenting member shall prepare a brief summary of the basis for his/her opinion, which shall be attached to the record forwarded for legal review. Only the Tribunal members shall be present during deliberation and voting.

H. Conduct Of Hearing

A CSRT Hearing Guide is attached at enclosure (8) and provides guidance on the conduct of the Tribunal hearing. The Tribunal's hearing shall be substantially as follows:

(1) The President shall call the Tribunal to order, and announce the order appointing the Tribunal (see enclosure (7)). The President shall also ensure that all participants are properly sworn to faithfully perform their duties.

(2) The Recorder shall cause a record to be made of the time, date, and place of the hearing, and the identity and qualifications of all participants. All proceedings shall be recorded on audiotape except those portions relating to deliberations and voting. Tribunal sessions where classified information is discussed shall be recorded on separate and properly marked audiotapes.

(3) The President shall advise the detainee of the purpose of the hearing, the detainee's opportunity to present evidence, and of the consequences of the Tribunal's decision. In cases requiring an interpreter, the President shall ensure the detainee understands these matters through the interpreter.

(4) The Recorder shall present to the Tribunal such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the evidence so presented shall constitute the "Government Evidence"). In the event the Government

Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also separately provide such evidence to the Tribunal.

(5) The Recorder shall present to the Tribunal an unclassified report summarizing the Government Evidence and any evidence to suggest that the detainee should not be designated as an enemy combatant. This report shall have been provided to the detainee's Personal Representative in advance of the Tribunal hearing.

(6) The Recorder shall call the witnesses, if any. Witnesses shall be excluded from the hearing except while testifying. An oath or affirmation shall be administered to each witness by the Recorder. When deemed necessary or appropriate, the Tribunal members can call witnesses who are reasonably available to testify or request the production of reasonably available documentary or other evidence.

(7) The detainee shall be permitted to present evidence and question any witnesses. The Personal Representative shall assist the detainee in obtaining unclassified documents and in arranging the presence of witnesses reasonably available and, if the detainee elects, the Personal Representative shall assist the detainee in the presentation of information to the Tribunal. The Personal Representative may, outside the presence of the detainee, present or comment upon classified information that bears upon the detainee's status if it would aid the Tribunal's deliberations.

(8) When deemed necessary and appropriate by any member of the Tribunal, the Tribunal may recess the Tribunal hearing to consult with the Legal Advisor as to any issues relating to evidence, procedure, or other matters. The President of the Tribunal shall summarize

on the record the discussion with the Legal Advisor when the Tribunal reconvenes.

(9) The Tribunal shall deliberate in closed session with only voting members present. The Tribunal shall make its determination of status by a majority vote. The President shall direct a Tribunal member to document the Tribunal's decision on the Combatant Status Review Tribunal Decision Report cover sheet (enclosure (9)), which will serve as the basis for the Recorder's preparation of the Tribunal record. The unclassified reasons for the Tribunal's decision shall be noted on the Tribunal Decision Report cover sheet, and should include, as appropriate, the detainee's organizational membership or affiliation with a governmental, military, or terrorist organization (e.g., Taliban, al Qaida, etc.). A dissenting member shall prepare a brief summary of the basis for his/her opinion.

(10) Both documents shall be provided to the Recorder as soon as practicable after the Tribunal concludes.

I. Post-Hearing Procedures

(1) The Recorder shall prepare the record of the hearing and ensure that the audiotape is preserved and properly classified in conformance with security regulations.

(2) The detainee's Personal Representative shall be provided the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

(3) The Recorder shall provide the completed record to the President of the Tribunal for signature and forwarding for legal review.

(4) In all cases the following items will be attached to the decision which, when complete and signed by the Tribunal President, shall constitute the record:

(a) A statement of the time and place of the hearing, persons present, and their qualifications;

(b) The Tribunal Decision Report cover sheet;

(c) The classified and unclassified reports detailing the fmdings of fact upon which the Tribunal decision was based;

(d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report will be properly marked and handled in accordance with all applicable security regulations; and

(e) A dissenting member's summary report, if any.

(5) The President of the Tribunal shall forward the Tribunal's decision and all supporting documents as set forth above to the Director, CSRT, acting as Convening Authority, via the CSRT Legal Advisor, within three working days of the date of the Tribunal decision. If additional time is needed, the President of the Tribunal shall request an extension from the Director, CSRT.

(6) The Recorder shall ensure that all audiotapes of the Tribunal hearing are properly marked with identifying information and classification markings, and stored in accordance with all applicable security regulations. These tapes may be reviewed and transcribed as necessary for the legal sufficiency and Convening Authority reviews.

(7) The CSRT Legal Advisor shall conduct a legal sufficiency review of all cases. The Legal Advisor shall render an opinion on the legal sufficiency of the Tri-

bunal proceedings and forward the record with a recommendation to the Director, CSRT. The legal review shall specifically address Tribunal decisions regarding reasonable availability of witnesses and other evidence.

(8) The Director, CSRT, shall review the Tribunal's decision and may approve the decision and take appropriate action, or return the record to the Tribunal for further proceedings. In cases where the Tribunal decision is approved and the case is considered final, the Director, CSRT, shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies.

(9) If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, and the Director, CSRT, approves the Tribunal's decision, the Director, CSRT, shall forward the written report of the Tribunal's decision directly to the Secretary of the Navy. The Secretary of the Navy shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies, in order to permit the Secretary of State to coordinate the transfer of the detainee with representatives of the detainee's country of nationality for release or other disposition consistent with applicable laws. In these cases the Director, CSRT, will ensure coordination with the Joint Staff with respect to detainee transportation issues.

(10) The detainee shall be notified of the Tribunal decision by the Director, CSRT. If the detainee has been determined to no longer be designated as an enemy combatant, he shall be notified of the Tribunal decision upon finalization of transportation arrangements or at such earlier time as deemed appropriate by the Commander, JTF-GTMO.

Recorder Qualifications, Roles and Responsibilities

A. Qualifications of the Recorder

(1) For each case, the Director, CSRT, shall select a commissioned officer in the grade of 0-3 or higher, preferably a judge advocate, to serve as a Recorder.

(2) Recorders must have at least a TOP SECRET security clearance. The Director shall ensure that only properly cleared officers are assigned as Recorders.

B. Roles of the Recorder

(1) Subject to section C (1), below, the Recorder has a duty to present to the CSRT such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the "Government Evidence"). In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also provide such evidence to the Tribunal.

(2) The Recorder shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Recorder shall coordinate with an Information Security Officer (ISO) in the handling and safeguarding of classified material before, during, and following the Tribunal process.

C. Responsibilities of the Recorder

(1) For each assigned detainee case under review, the Recorder shall obtain and examine the Government Information as defined in paragraph E (3) of enclosure (1).

(2) The Recorder shall draft a proposed unclassified summary of the relevant evidence derived from the Government Information.

(3) The Recorder shall ensure appropriate coordination with original classification authorities for any classified information presented that was used in the preparation of the proposed unclassified summary.

(4) The Recorder shall permit the assigned Personal Representative access to the Government Information and will provide the unclassified summary to the Personal Representative in advance of the Tribunal hearing.

(5) The Recorder shall ensure that coordination is maintained with Joint Task Force-Guantanamo Bay and the Criminal Investigative Task Force to deconflict any other ongoing activities and arrange for detainee movements and security.

(6) The Recorder shall present the Government Evidence orally or in documentary form to the Tribunal. The Recorder shall also answer questions, if any, asked by the Tribunal.

(7) The Recorder shall administer an appropriate oath to the Tribunal members, the Personal Representative, the paralegal/reporter, the interpreter, and all witnesses (including the detainee if he elects to testify under oath).

(8) The Recorder shall prepare a Record of Proceedings, and, if applicable, a record of the dissenting member's report. The Record of Proceedings should include:

(a) A statement of the time and place of the hearing, persons present, and their qualifications;

(b) The Tribunal Decision Report cover sheet;

(c) The classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based;

(d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report will be properly marked and handled in accordance with applicable security regulations; and

(e) A dissenting member's summary report, if any.

(9) The Recorder shall provide the detainee's Personal Representative the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

(10) The Recorder shall submit the completed Record of Proceedings to the President of the Tribunal who shall sign and forward it to the Director, CSRT via the CSRT Legal Advisor. Once signed by the Tribunal President, the completed record is considered the official record of the Tribunal's decision.

(11) The Recorder shall ensure that all audiotapes of the Tribunal hearing are properly marked with identifying information and classification markings, and stored in accordance with applicable security regulations. These tapes are considered part of the case record and may be reviewed and transcribed as necessary for the legal sufficiency and convening authority reviews.

Personal Representative Qualifications, Roles and Responsibilities

A. Qualifications of Personal Representative

(1) For each case, the Director, CSRT, shall select a commissioned officer serving in the grade of 0-4 or higher to serve as a Personal Representative. The Personal Representative shall not be a judge advocate.

(2) Personal Representatives must have at least a TOP SECRET security clearance. The Director shall ensure that only properly cleared officers are assigned as Personal Representatives.

B. Roles of the Personal Representative

(1) The detainees were notified of the Tribunal process per reference (a). When detailed to a detainee's case the Personal Representative shall further explain the nature of the CSRT process to the detainee, explain his opportunity to present evidence and assist the detainee in collecting relevant and reasonably available information and in preparing and presenting information to the Tribunal.

(2) The Personal Representative shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Personal Representative shall coordinate with an Information Security Officer (ISO) in the handling and safeguarding of classified material before, during, and after the Tribunal process.

C. Responsibilities of the Personal Representative

(1) The Personal Representative is responsible for explaining the nature of the CSRT process to the detainee. Upon first contact with the detainee, the Personal Representative shall explain to the detainee that no confidential relationship exists or may be formed

between the detainee and the Personal Representative. The Personal Representative shall explain the detainee's opportunity to make a personal appearance before the Tribunal. The Personal Representative shall request an interpreter, if needed, to aid the detainee in making such appearance and in preparing his presentation. The Personal Representative shall explain to the detainee that he may be subject to questioning by the Tribunal members, but he cannot be compelled to make any statement or answer any questions. Paragraph D, below, provides guidelines for the Personal Representative meeting with the enemy combatant prior to his appearance before the Tribunal.

(2) After the Personal Representative has reviewed the Government Information, had an opportunity to consult with the detainee, and notified the detainee of his opportunity to contest his status, even if the detainee declines to participate as set forth above, the Personal Representative shall complete a Detainee Election Form (enclosure (5)) and provide this form to the Director, CSRT.

(3) The Personal Representative shall review the Government Evidence that the Recorder plans to present to the CSRT and shall permit the Recorder to review documentary evidence that will be presented to the CSRT on the detainee's behalf.

(4) Using the guidelines set forth in paragraph D, the Personal Representative shall meet with the detainee, using an interpreter if necessary, in advance of the CSRT. In no circumstance shall the Personal Representative disclose classified information to the detainee.

(5) If the detainee elects to participate in the Tribunal process, the Personal Representative shall present information to the Tribunal if the detainee so requests.

The Personal Representative may, outside the presence of the detainee, comment upon classified information submitted by the Recorder that bears upon the presentation made on the detainee's behalf, if it would aid the Tribunal's deliberations.

(6) If the detainee elects not to participate in the Tribunal process, the Personal Representative shall assist the detainee by presenting information to the Tribunal in either open or closed sessions and may, in closed sessions, comment upon classified information submitted by the Recorder that bears upon the detainee's presentation, if it would aid the Tribunal's deliberations.

(7) The Personal Representative shall answer questions, if any, asked by the Tribunal.

(8) The Personal Representative shall be provided the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

D. Personal Representative Guidelines for Assisting the Enemy Combatant

In discussing the CSRT process with the detainee and completing the Detainee Election Form, the Personal Representative shall use the guidelines provided below to assist the detainee in preparing for the CSRT:

You have already been advised that a Combatant Status Review Tribunal has been established by the United States government to review your classification as an enemy combatant.

A Tribunal of military officers shall review your case in "x" number of days [or other time frame as known], and I have been assigned to ensure you understand this process. The Tribunal shall review your case file, offer you an opportunity to speak on your own behalf if you desire, and ask questions. You also can choose not to appear at the Tribunal hearing. In that case I will be at the hearing and will assist you if you want me to do so.

You will be provided with an opportunity to review unclassified information that relates to your classification as an enemy combatant. I will be able to review additional information that is classified. I can discuss the unclassified information with you.

> You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence and I will attend.
>
> You will have the opportunity to question witnesses testifying at the Tribunal.
>
> You will have the opportunity to present evidence to the Tribunal, including calling witnesses to testify on your behalf if those witnesses are reasonably available. If a witness is not considered by the Tribunal as reasonably available to testify in person, the Tribunal can consider evidence submitted by telephone, written statements, or other means rather than having a witness testify in person. I am available to assist you in gathering and presenting these materials, should you desire to do so. After the hearing, the Tribunal shall determine whether you should continue to be designated as an enemy combatant.

I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing.

I am available to assist you in preparing an oral or written presentation to the Tribunal should you desire to do so. I am also available to speak for you at the hearing if you wish that kind of assistance.

Do you understand the process or have any questions about it?

The Tribunal is examining one issue: whether you are an enemy combatant against the United States or its coalition partners. Any information you can provide to the Tribunal relating to your activities prior to your capture is very important in answering this question. However, you may not be compelled to testify or answer questions at the Tribunal hearing.

Do you want to participate in the Tribunal process and appear before the Tribunal?

Do you wish to present information to the Tribunal or have me present information for you?

Is there anyone here in the camp or elsewhere who can testify on your behalf regarding your capture or status?

Do you want to have anyone else submit any information to the Tribunal regarding your status? [If so,] how do I contact them? If feasible and you can show the Tribunal how the information is relevant to your case, the Tribunal will endeavor to arrange for evidence to be provided by other means such as mail, e-mail, faxed copies, or telephonic or video-telephonic testimony.

Do you have any questions?

Combatant Status Review Tribunal Notice to Detainees*

You are being held as an enemy combatant by the United States Armed Forces. An enemy combatant is an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. The definition includes any person who has committed a belligerent act or has directly supported such hostilities.

The U.S. Government will give you an opportunity to contest your status as an enemy combatant. Your case will go before a Combatant Status Review Tribunal, composed of military officers. This is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held. The Tribunal will provide you with the following process:

1. You will be assigned a military officer to assist you with the presentation of your case to the Tribunal. This officer will be known as your Personal Representative. Your Personal Representative will review information that may be relevant to a determination of your status. Your Personal Representative will be able to discuss that information with you, except for classified information.

2. Before the Tribunal proceeding, you will be given a written statement of the unclassified factual basis for your classification as an enemy combatant.

3. You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence. Your Personal Representative will attend in either case.

4. You will be provided with an interpreter during the Tribunal hearing if necessary.

5. You will be able to present evidence to the Tribunal, including the testimony of witnesses. If those witnesses you propose are not reasonably available, their written testimony may be sought. You may also present written statements and other documents. You may testify before the Tribunal but will not be compelled to testify or answer questions.

As a matter separate from these Tribunals, United States courts have jurisdiction to consider petitions brought by enemy combatants held at this facility that challenge the legality of their detention. You will be notified in the near future what procedures are available should you seek to challenge your detention in U.S. courts. Whether or not you decide to do so, the Combatant Status Review Tribunal will still review your status as an enemy combatant.

If you have any questions about this notice, your Personal Representative will be able to answer them.

[* Text of Notice translated, and delivered to detainees 12-14 July 2004]

App. 175

Sample Detainee Election Form

Date/Time: _____

ISN#: _____

Personal Representative: _____
[Name/Rank]

Translator Required?Language?

CSRT Procedures Read to Detainee or Written Copy Read by Detainee? _____

_____

Detainee Election:

_ Wants to Participate in Tribunal

_ Wants Assistance of Personal Representative

_ Affirmatively Declines to Participate in Tribunal

_ Uncooperative or Unresponsive

Personal Representative Comments:

_____
_____
_____
_____
_____
_____

_____
Personal Representative

Sample Nomination Questionnaire

Department of Defense
Director, Combatant Status Review Tribunals

As a candidate to become a Combatant Status Review Tribunal member, Recorder, or Personal Representative, please complete the following questionnaire and provide it to the Director, Combatant Status Review Tribunal (CSRT). Because of the sensitive personal information requested, no copy will be retained on file outside of the CSRT.

1. Name (Last, First MI)_____ 2. Rank/Grade_____

3. Date of Rank_____ 4. Service _____ 5. Active Duty Service Date _____

6. Desig/MOS _____ 7. Date Current Tour Began: _____

8. Security Clearance Level _____ 9. Date of clearance: _____

10. Military Awards / Decorations:_____

_____

11. Current Duty Position_____ 12. Unit: _____

13. Date of Birth _____ 14. Gender ____ 15. Race or Ethnic Origin _____

16. Civilian Education. College/Vocational/Civilian Professional School: _____

17. Date graduated or dates attended (and number of years), school, location, degree/major:_____

_____

_____

18. Military Education. Dates attended, school/course title._____

_____

_____

19. Duty Assignments. Last four assignments, units, and dates of assignments. _____

_____

_____

_____

20. Have you had any relative or friend killed or wounded in Afghanistan or Iraq? _____ Explain.

_____

_____

_____

21. Have you had any close relative or friend killed, wounded, or impacted by the events of September 11, 2001? ____ Explain._____

_____

_____

_____

22. Have you ever been in an assignment related to enemy prisoners of war or enemy combatants, to include the apprehension, detention, interrogation, or previous determination of status of a detainee at Guantanamo Bay? _____ Explain._____

_____

_____

_____

23. Do you believe you may be disqualified to serve as a Tribunal member, Recorder, or Personal Representative for any reason? Explain. _____

_____

_____

_____

24. Your name or image as well as information related to the enemy combatant may be released to the public in conjunction with the Combatant Status Review Tribunal process. Could this potential public affairs release affect your ability to objectively serve in any capacity in the Tribunal process? Y/N_____Explain._____

_____

_____

_____

SIGNATURE OF OFFICER:_____DATE: _____

Approved____ Disapproved_____ Director, CSRT

Sample Appointment Letter for Combatant Status Review Tribunal Panel

[logo] Department of Defense
Director, Combatant Status Review Tribunals

From: Director, Combatant Status Review Tribunals

Subj: APPOINTMENT OF COMBATANT STATUS REVIEW TRIBUNAL

Ref: (a) Convening Authority Appointment Letter of 7 July 2004

By the authority given to me in reference (a), a Combatant Status Review Tribunal established by DCN XXX "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba" is hereby convened. It shall hear such cases as shall be brought before it without further action of referral or otherwise.

The following commissioned officers shall serve as members of the Tribunal:

MEMBERS:

XXX, 999-99-9999; President*

YYY, 999-99-9999; Member*

ZZZ, 999-99-9999; Member*

J.M. MCGARRAH
RADM, CEC, USNR

[* The Order should note which member is the Judge Advocate required to be on the Tribunal.]

Combatant Status Review Tribunal Hearing Guide

RECORDER: All rise. (The Tribunal enters)

[In Tribunal sessions where the detainee has waived participation, the Tribunal can generally omit the italicized portions.]

PRESIDENT: This hearing shall come to order.

RECORDER: This Tribunal is being conducted at [Time/Date] on board Naval Base Guantanamo Bay, Cuba. The following personnel are present:

_____, President

_____, Member

_____, Member

_____, Personal Representative

_____, Interpreter,

_____, Reporter/Paralegal, and

_____, Recorder

[Rank/Name] is the Judge Advocate member of the Tribunal.

PRESIDENT: The Recorder will be sworn. Do you, (name and rank of the Recorder) swear (or affirm) that you will faithfully perform the duties assigned in this Tribunal (so help you God)?

RECORDER: I do.

PRESIDENT: The reporter/paralegal will now be sworn.

RECORDER: Do you (name and rank of reporter/paralegal) swear or affirm that you will faithfully discharge your duties as assigned in this tribunal?

REPORTER/PARALEGAL: I do.

PRESIDENT: *The interpreter will be sworn. [If needed for witness testimony when detainee not present]*

RECORDER: Do you swear (or affirm) that you will faithfully perform the duties of interpreter in the case now hearing (so help you God)?

INTERPRETER: I do.

PRESIDENT: We will take a brief recess while the detainee is brought into the room.

RECORDER: All Rise.

[Tribunal members depart, followed by the Recorder, Personal Representative, Interpreter, and Court Reporter. The detainee is brought into the room. All participants except the Tribunal members return to the Tribunal room.]

RECORDER: All Rise. [The Tribunal members enter the room.]

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: This hearing will come to order. You may be seated.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: *(NAME OF DETAINEE)*, this Tribunal is convened by order of the Director, Combatant Status Review Tribunals under the provisions of his Order of XX July 2004. It will determine whether *you [or Name of Detainee]* meet the criteria to be designated as an enemy combatant against the United States or its allies or otherwise meet the criteria to be designated as an enemy combatant.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: This Tribunal shall now be sworn. All rise.

INTERPRETER: (TRANSLATION OF ABOVE).

[All persons in the room stand while Recorder administers the oath. Each voting member raises his or her right hand as the Recorder administers the following oath:]

RECORDER: Do you swear (affirm) that you will faithfully perform your duties as a member of this Tribunal; that you will impartially examine and inquire into the matter now before you according to your conscience, and the laws and regulations provided; that you will make such findings of fact and conclusions as are supported by the evidence presented; that in determining those facts, you ~~will use~~ your professional knowledge, best judgment, and common sense; and that you will make such findings as are appropriate according to the best of your understanding of the rules, regulations, and laws governing this proceeding, and guided by your concept of justice (so help you God)?

MEMBERS OF TRIBUNAL: I do.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: The Recorder will now administer the oath to the Personal Representative.

INTERPRETER: (TRANSLATION OF ABOVE).

[The Tribunal members lower their hands but remain standing while the following oath is administered to the Personal Representative:]

RECORDER: Do you swear (or affirm) that you will faithfully perform the duties of Personal Representative in this Tribunal (so help you God)?

PERSONAL REPRESENTATIVE: I do.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: Please be seated. The Reporter, Recorder, and Interpreter have previously been sworn. This Tribunal hearing shall come to order.

[All personnel resume their seats.]

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT (NAME OF DETAINEE), you are hereby advised that the following applies during this hearing:

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may be present at all open sessions of the Tribunal. However, if you become disorderly, you will be removed from the hearing, and the Tribunal will continue to hear evidence.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may not be compelled to testify at this Tribunal. However, you may testify if you wish to do so. Your testimony can be under oath or unworn.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may have the assistance of a Personal Representative at the hearing. Your assigned Personal Representative is present.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may present evidence to this Tribunal, including the testimony of witnesses who are reasonably available. You may question witnesses testifying at the Tribunal.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may examine documents or statements offered into evidence other than classified information. However, certain documents may be partially masked for security reasons.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: Do you understand this process?

INTERPRETER: (TRANSLATION OF ABOVE)

PRESIDENT: Do you have any questions concerning the Tribunal process?

INTERPRETER: (TRANSLATION OF ABOVE)

[In Tribunal sessions where the detainee has waived participation substitute:

PRESIDENT: [Rank/Name of Personal Representative] you have advised the Tribunal that [Name of Detainee] has elected to not participate in this Tribunal proceeding. Is that still the situation?

PERSONAL REPRESENTATIVE: Yes/No. [Explain].

PRESIDENT: Please provide the Tribunal with the Detainee Election Form marked as Exhibit D-a.]

[Presentation of Unclassified Information by Recorder and Detainee or his Personal Representative. Recorder evidence shall be marked in sequence R-1, R-2, etc. while evidence presented for the detainee shall be marked in sequence D-a, D-b, etc.]

[The Interpreter shall translate as necessary during this portion of the Tribunal.]

PRESIDENT: Recorder, please provide the Tribunal with the unclassified evidence.

RECORDER: I am handing the Tribunal what has previously been marked as Exhibit R-l, the unclassified summary of the evidence that relates to this detainee's status as an enemy combatant. A translated copy of this exhibit was provided to the Personal Representative in advance of this hearing for presentation to the detainee. In addition, I am handing to the Tribunal the following unclassified exhibits, marked as Exhibit R-2 through R-x. Copies of these Exhibits have previously been provided to the Personal Representative.

PRESIDENT: Does the Recorder have any witnesses to present?

RECORDER: Yes/no.

If witnesses appear before the Tribunal, the Recorder shall administer an appropriate oath:

Form of Oath for a Muslim

Do you [Name], in the Name of Allah, the Most Compassionate, the Most Merciful, swear that your testimony before this Tribunal will be the truth?

Form of Oath or Affirmation for Others

Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

INTERPRETER: (TRANSLATION AS NECESSARY)

[Witnesses may be questioned by the Tribunal members, the Recorder, the Personal Representative, or the detainee.]

RECORDER: Mr./Madam President, I have no further unclassified information for the Tribunal but request a closed Tribunal session at an

appropriate time to present classified information relevant to this detainee's status as an enemy combatant.

PRESIDENT: [*Name of detainee*] (or Personal Representative), *do you* (or does the detainee) want to present information to this Tribunal?

[If detainee not present, Personal Representative may present information to the Tribunal.]

INTERPRETER: (TRANSLATION OF ABOVE).

[If the detainee elects to make an oral statement:]

PRESIDENT: [Name of detainee] would you like to make your statement under oath?

INTERPRETER: (TRANSLATION OF ABOVE).

[After statement is completed:]

PRESIDENT: [Name of detainee] does that conclude your statement?

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: [Determines whether Tribunal members, Recorder, or Personal Representative have any questions for detainee.]

PRESIDENT: [Name of detainee] do you have any other evidence to present to this Tribunal?

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: All unclassified evidence having been provided to the Tribunal, this concludes this Tribunal session.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: *(Name of detainee), you shall be notified of the Tribunal decision upon completion of the review of these proceedings by the convening authority in Washington, D.C.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *If the Tribunal determines that you should not be classified as an enemy combatant, you will be released to your home country as soon as arrangements can be made.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *If the Tribunal confirms your classification as an enemy combatant you shall be eligible for an Administrative Review Board hearing at a future date.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *That Board will make an assessment of whether there is continued reason to believe that you pose a threat to the United States or its allies in the ongoing armed conflict against terrorist organizations such as al Qaida and its affiliates and supporters or whether there are other factors bearing upon the need for continued detention.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *You will have the opportunity to be heard and to present information to the Administrative Review Board. You can present information from your family that might help you at the Board. You are encouraged to contact your family as soon as possible to begin to gather information that may help you.*

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: A military officer will be assigned at a later date to assist you in the Administrative Review Board process.

INTERPRETER: (TRANSLATION OF ABOVE)

PRESIDENT: This Tribunal hearing is adjourned.

RECORDER: All Rise. [If moving into Tribunal session in which classified material will be discussed add:] This Tribunal is commencing a closed session. Will everyone but the Tribunal members, Personal Representative, and Reporter/Paralegal please leave the Tribunal room.

PRESIDENT: [When Tribunal room is ready for closed session.] You may be seated. The Tribunal for [Name of detainee] is now reconvened without the detainee being present to prevent a potential compromise of national security due to the classified nature of the evidence to be considered. The Recorder will note the date and time of this session for the record.

[Closed Tribunal Session Commences, as necessary, with only properly cleared personnel present. Presentation of classified information by Recorder and, when appropriate, Personal Representative. Recorder evidence shall be marked in sequence R-1, R-2, etc. while evidence presented for the detainee shall be marked in sequence D-a, D-b, etc. All evidence will be properly marked with the security classification.]

PRESIDENT: This Tribunal session is adjourned and the Tribunal is closed for deliberation and voting.

RECORDER: Notes time and date when Tribunal closed.

App. 188

[CLASSIFICATION]

Combatant Status Review Tribunal
Decision Report Cover Sheet

[CLASSIFICATION]: UNCLASSIFIED Upon Removal of Enclosure(s) (2) [and (3)]

TRIBUNAL PANEL: _____

ISN #: _____ DATE: _____

Ref: (a) Convening Order of XX YYY 2004
(b) CSRT Implementation Directive of XX July 2004
(c) DEPSECDEF Memo of 7 July 2004

End: (1) Unclassified Summary of Basis for Tribunal Decision (U)
(2) Classified Summary of Basis for Tribunal Decision (U)
(3) Copies of Documentary Evidence Presented (U)

This Tribunal was convened by references (a) and (b) to make a determination as to whether the detainee meets the criteria to be designated as an enemy combatant as defined in reference (c).

The Tribunal has determined that he (is) (is not) designated as an enemy combatant as defined in reference (c).

[If yes] In particular the Tribunal finds that this detainee is a member of, or affiliated with, _____(al Qaida, Taliban, other), as more fully discussed below and in the enclosures.

Enclosure (1) provides an unclassified account of the basis for the Tribunal's decision, as summarized below. A detailed account of the evidence considered by the Tribunal and its findings of fact are contained in enclosure (2).

_____

_____

_____

_____

_____

(Rank, Name) President

APPENDIX K

May 11, 2004

ORDER

SUBJECT: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba

1. INTRODUCTION AND BACKGROUND

This Order establishes an administrative review process to assess annually the need to continue to detain each enemy combatant during the course of the current and ongoing hostilities. This process will permit each enemy combatant in the control of the Department of Defense ("DoD") at the Guantanamo Bay Naval Base, Cuba ("GTMO") to explain why he is no longer a threat to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters or to explain why his release would otherwise be appropriate.*

The law of war permits the detention of enemy combatants until the end of an armed conflict. It permits that detention for the practical purpose of preventing the enemy from rejoining the conflict. It does not require the use of a review process to support continued detention. Nevertheless, to address some unique and unprecedented characteristics of the current conflict, DoD has determined, as a matter of policy, to implement these procedures. These procedures may be amended from time to time, also as a matter of policy, as circumstances in the conflict warrant.

A. *Existing Procedures.*

The procedures established by this Order offer a layer of review in addition to the other layers of review already in

* Similar administrative review procedures will be issued for enemy combatants in the control of DoD in the United States.

place for enemy combatants detained at GTMO. Under pre-existing guidance, captured individuals are assessed at the time of their capture by military officers in the field. Those officers determine whether those captured individuals were part of or supporting forces hostile to the United States or coalition partners, or otherwise engaged in an armed conflict against the United States. If the individuals detained meet those criteria, they are enemy combatants. If they do not, they are released.

Those persons determined to be enemy combatants are subsequently sent to a centralized holding facility where a military screening team reviews all available information regarding each detainee to again review whether the individual is an enemy combatant. With the assistance of other U.S. government officials (including military lawyers, intelligence officers, and federal law enforcement officials) and considering all relevant information (including the facts from capture and detention, the threat the individual poses, his intelligence value, and any law enforcement interest) the military screening team assesses whether the detainee is an enemy combatant and should continue to be detained and whether transfer to GTMO is warranted.

After the screening team makes this assessment, a general officer designated by the combatant commander reviews the central holding area screening team's recommendation. When determining whether a detainee should be transferred to GTMO, the combatant commander considers the threat posed by the detainee, his seniority within hostile forces, possible intelligence that may be gained from the detainee, possible law of war violations committed by the detainee, and any other relevant factors. DoD officials in Washington review those proposed for transfer to GTMO prior to their transfer. An internal DoD review panel, including legal advisors, reviews the recommendations of the combatant commander and advises the Secretary of Defense on proposed detainee

transfers to GTMO. All available information is considered in those reviews, including information submitted by other governments or obtained from the detainees themselves. In the event that enemy combatants are transferred to GTMO, immediately upon their arrival at GTMO, they are interviewed and further assessments are made based on relevant information, including detainee interviews, U. S. intelligence and law enforcement sources, and information supplied by foreign governments.

Each enemy combatant detained at GTMO also undergoes an extensive assessment of the threat he poses. This threat assessment process is used to determine whether, notwithstanding his status as an enemy combatant, he can be transferred to the custody of another government, can be released, or should remain detained in the control of DoD. Threat assessments of each detainee are made by an integrated team of interrogators, analysts, behavioral scientists, and regional experts. Those threat assessments are provided to the Commander, U.S. Southern Command for review and recommendation. The Southern Command then forwards its recommendations to an interagency committee in Washington that includes law enforcement, intelligence, and defense representatives. That interagency committee makes an assessment and recommendation. The Secretary of Defense or his designee then decides whether transfer of the detainee to the custody of another government, release of that individual, or his continued detention in DoD control is appropriate.

B. *Relationship of this Order to Existing Procedures.*

Once an enemy combatant has been reviewed by the interagency process described above and the Secretary of Defense or his designee has determined that his continued detention in the control of DoD is appropriate, he will be eligible for review of the need for his continued detention under the procedures this Order establishes. This Order provides the authority to empanel as many review board panels as are

deemed necessary to accomplish the review of the enemy combatants in the control of DoD at GTMO.

2. ESTABLISHMENT OF ADMINISTRATIVE REVIEW PROCESS

A. *Administrative Review Process.* There is established the Administrative Review Board ("Review Board"). The Review Board will assess whether each enemy combatant remains a threat to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters or if there is any other reason that it is in the interest of the United States and its allies for the enemy combatant to remain in the control of DoD. Based on that assessment, the Review Board will recommend whether the enemy combatant should continue to be detained in the control of DoD.

B. *Administrative Review Board.* The Review Board shall be composed of three or more military officers.

i. *Establishment of Review Board.*

a. The Review Board shall report to and be selected by a presidentially-appointed Senate-confirmed civilian in the Department of Defense whom the Secretary of Defense has designated to operate and oversee the administrative review process ("designated civilian official" or "DCO").

b. The Review Board may sit in panels of three members each.

c. The DCO may establish as many review board panels as he deems necessary.

ii. *Qualifications of Review Board Members.*

a. Military officers assigned to serve as Review Board members shall be those who are, in the

DCO's view, qualified for the duty by reason of education, training, experience, length of service, temperament, and objectivity.

b. At least one member of a Review Board panel shall be experienced in the field of intelligence.

C. *Presiding Officer.* For the purpose of its deliberations and any hearing held pursuant to this Order, the senior member of the Review Board, or any Review Board panel, shall be the presiding officer. The sole role of the presiding officer as presiding officer shall be to ensure the orderliness of board proceedings. The presiding officer's vote in board determinations will be accorded the same weight as the votes of the other members of the Review Board.

D. *Legal Counsel.* The General Counsel of DoD shall ensure that the Review Board has the assistance of legal counsel.

E. *Enemy Combatants Eligible for the Procedures in this Order.* Enemy combatants who are in the control of DoD at GTMO are eligible for the review procedures established in this Order.

i. Enemy combatants whom the President has determined to be subject to his Military Order of November 13, 2001 are excepted from the procedures established in this Order until the disposition of any charges against them or the service of any sentence imposed by a military commission.

ii. An enemy combatant in the control of DoD at GTMO will become eligible for the review process once he has been reviewed through the previously established procedures described in Section 1 and the Secretary or his designee has determined that his continued detention is appropriate.

iii. An enemy combatant may decline in writing to participate in the procedures established by this Order. If the enemy combatant is unable to provide a written declination, the assisting military officer provided under Section 3.B shall prepare and execute such a writing on the enemy combatant's behalf.

3. ADMINISTRATIVE REVIEW BOARD PROCEEDINGS

A. *Review Board Proceedings.* The proceedings before the Review Board shall be non-adversarial.

i. *Provision of Information by the Government of the State of Which the Enemy Combatant is a National.*

a. Unless the DCO determines that it is not consistent with national security, the DCO shall request that the Department of State notify the State of which the enemy combatant is a national ("the State") of the proceedings.

1) The notice shall be provided in advance of the proceedings to permit the State to prepare and present information to the Review Board.

2) The notice to the State shall provide that information submitted by the State shall be in writing, except as otherwise deemed appropriate by the Review Board, and that it shall be provided on or before a date specified by the Review Board.

3) Unless the DCO concludes that it is not consistent with national security, the notice shall also include a request for the State to notify the enemy combatant's relatives of the proceedings and inform them that they

may provide information relevant to the proceedings through the State's written submissions.

b. Unless the DCO determines that it is not consistent with national security, the State may submit to the Review Board information of any nature, including information related to the threat posed by the enemy combatant to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters.

c. In the event that the submission of a State is not received by the date established by the Review Board, the Review Board may disregard the State's submission.

ii. *Provision of Information by a Designated Military Officer.*

a. A designated military officer ("Designated Military Officer") shall provide to the Review Board all reasonably available threat information in the possession of DoD regarding the enemy combatant under review and any other information indicating whether it would be in the interest of the United States and its allies to release, transfer, or continue to detain the enemy combatant. That information shall include any information that tends to support continued detention as well as any information that tends to support release or transfer.

b. The Designated Military Officer is not an advocate for or against the continued detention of the enemy combatant under review.

c. The Designated Military Officer who shall be selected by the DCO must meet the same qualifications set forth for members of the Review Board under Section 2.B.ii.a.

d. In addition to any other information or documentation presented to the Review Board, the Designated Military Officer shall prepare, in unclassified form, a written summary of the primary factors favoring continued detention of the enemy combatant and the primary factors favoring release or transfer. When the Review Board deems it appropriate, the Designated Military Officer may present information orally.

iii. *Presentation of Information by the Enemy Combatant.*

a. *Notice.* Prior to the enemy combatant's hearing, the Review Board shall provide notice to the enemy combatant of the hearing and shall make available to the enemy combatant the written summary prepared by the Designated Military Officer.

1) The summary provided to the enemy combatant shall be in a language he understands.

2) The summary provided to the enemy combatant shall be provided sufficiently in advance of the hearing so as to permit him to prepare his presentation to the Review Board.

3) In no circumstances shall classified information be made available to the enemy combatant.

b. *Opportunity to be Heard.* The enemy combatant shall be permitted to present to the Review Board information on why he is no longer a threat to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters, why it is otherwise appropriate that he be released, or any other relevant information.

1) The enemy combatant will be permitted to present this information in person at a hearing before the Review Board.

2) Members of the Review Board may question the enemy combatant during the hearing.

3) If necessary, an interpreter shall be supplied for the combatant's presentation of information to the Review Board.

B. *Assistance to the Enemy Combatant.* The Review Board shall assign a military officer ("Assisting Military Officer") to assist the enemy combatant in preparing his presentation to the Review Board.

i. The Review Board shall select the Assisting Military Officer from a pool of military officers selected by the DCO to serve as Assisting Military Officers.

a. The Assisting Military Officer shall meet the same qualifications established for members of the Review Board under Section 2.B.ii.a.

b. The Assisting Military Officer and the Designated Military Officer may not be the same person in the review of an enemy combatant.

ii. The Assisting Military Officer shall be responsible for explaining to the enemy combatant the nature of his hearing before the Review Board.

iii. The Assisting Military Officer shall be permitted to see all information and documentation provided to the Review Board by the Designated Military Officer.

iv. The Assisting Military Officer shall be permitted to meet with the enemy combatant prior to the enemy combatant's presentation to the board. If necessary, an interpreter shall be supplied for those meetings.

v. If the enemy combatant so elects, the Assisting Military Officer may also present information to the Review Board on behalf of the enemy combatant. If the enemy combatant has made such an election and the Assisting Military Officer believes that it would aid the Review Board's deliberations, the Assisting Military Officer may also, outside the presence of the enemy combatant, comment upon classified information that has been submitted to the Board and that bears upon the enemy combatant's presentation.

C. *Information from Other Relevant U.S. Government Agencies.* The Review Board shall provide to the Department of State, the Department of Justice, the Department of Homeland Security, and the Central Intelligence Agency notice of the proceedings for the enemy combatant.

i. That notice shall be provided in advance of the proceedings for that enemy combatant so as to permit the agencies sufficient time to provide to the Review Board any information they deem relevant prior to the hearing.

ii. Any submissions that these agencies elect to provide shall be in written form except in extraordinary cases.

iii. In the event that the summary prepared by the Designated Military Officer and provided to the enemy combatant includes information that originated in U.S. government agencies other than DoD, the Review Board must obtain the originating agency's permission to share that information with the enemy combatant in any form.

D. *Additional Fact-Gathering.* If, after the initial presentation of information, the Review Board believes additional information is necessary before it can make a recommendation, the Review Board may seek additional facts. It may, among other things:

i. submit written questions to the Designated Military Officer or the Assisting Military Officer;

ii. request further behavioral assessments of the combatant;

iii. request further questioning of any other combatants who have had contact with the enemy combatant under review while in detention to the extent that the Combatant Commander determines that such questioning is consistent with ongoing intelligence collection; and

iv. seek other information that may be obtained readily.

E. *Review Board Recommendations.* The Review Board shall make a written assessment of whether there is reason to believe that the enemy combatant poses a threat to the United States or its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters and any other factors bearing upon the

need for continued detention. Based on that assessment, the Review Board shall provide to the DCO a written recommendation on whether detention should be continued.

i. The Review Board's assessment and recommendation shall be independent, based on the Review Board's review of all reasonably available information.

ii. The Review Board's assessment and recommendation shall be reached by a majority of the members of the Review Board panel. In the event that a recommendation is not unanimous, any dissenting board member may submit a minority report to the DCO. That report shall take the same form as the written assessment and recommendation to be submitted by the majority.

iii. The Review Board's written assessment and recommendation shall include:

   a. the Review Board's conclusion regarding the threat posed by the enemy combatant;

   b. supporting reasons for that conclusion regarding the threat, including, but not limited to, a summary of information relied upon in reaching that conclusion;

   c. any other reasons that the continued detention of the enemy combatant remains or does not remain in the interest of the United States and its allies; and

   d. the supporting reasons for the recommendation.

iv. The written assessment and recommendation shall be provided to the DCO along with the record of the proceedings. Notice of the assessment and recommendation shall also be provided to any

U.S. government agency that submitted information to the Review Board.

v. The determination to continue to detain, release, or seek the transfer of the enemy combatant to the control of another government rests with the DCO. The DCO shall examine whether there is reason to believe that the enemy combatant poses a threat to the United States or its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters and any other factors bearing upon the need for continued detention. Based on that examination, the DCO shall determine whether to continue to detain, release, or seek the transfer of the enemy combatant to the control of another country. He shall give full consideration to the written assessment and recommendation of the Review Board.

vi. Notification of the DCO's determination will be provided to the Secretary of Defense, the enemy combatant, the Review Board, the relevant government agencies, and to the extent consistent with national security, the State of which the enemy combatant is a national.

F. *Frequency of Review.* The Review Board shall examine the need for the continued detention of each combatant at least annually insofar as is practicable.

4. ROLE OF THE DCO

A. The DCO shall oversee and operate the administrative review process established by this Order.

B. The DCO may establish as many review board panels as he deems necessary.

C. The DCO shall, as he deems necessary and appropriate, coordinate his actions and determinations with other U.S. government departments and agencies.

D. The DCO may seek the assistance of the General Counsel of DoD as appropriate.

E. The DCO shall have the authority to request support, including but not limited to military and civilian personnel, administrative assistance, and logistical assistance, from the head of any DoD component or office to oversee and operate the administrative review process and to accomplish the transfer or release of an enemy combatant. DoD component heads shall promptly provide such assistance. In addition, the DCO may seek the establishment of an executive agency or agencies under DoD Directive 5101.1 to assist him in implementing this Order.

F. The authority granted to the DCO in this Order may not be delegated except with the approval of the Secretary of Defense.

5. CLASSIFIED INFORMATION

Classified information shall be handled in accordance with all applicable laws and regulations. The DCO should issue implementing guidance to ensure the proper handling and protection of classified information.

6. OTHER

This Order is neither intended to nor does it create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. These procedures involve military authority exercised in the field in time of war. No provision in this Order shall be construed to be a requirement of the United States Constitution or a requirement of any other body of law nor shall this Order be construed to alter the requirements that the law of war imposes. The procedures established by this Order, along with the other procedures described above, have been implemented as a matter of discretion. Because the

procedures described in this Order have been instituted as a matter of discretion, the Secretary of Defense may suspend or amend the procedures set forth in this Order at any time.

7. IMPLEMENTING GUIDANCE

The DCO may, as he deems appropriate, issue guidance to implement this Order.

8. EFFECTIVE DATE

This Order is effective immediately.

Paul Wolfowitz
Deputy Secretary of Defense

APPENDIX L

REPORT ON GUANTANAMO DETAINEES

A Profile of 517 Detainees through Analysis of Department of Defense Data

By
Mark Denbeaux
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Joshua Denbeaux, Esq.
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David Gratz, John Gregorek, Matthew Darby, Shana Edwards, Shane Hartman, Daniel Mann and Helen Skinner
Students, Seton Hall University School of Law

THE GUANTANAMO DETAINEES: THE GOVERNMENT'S STORY

Professor Mark Denbeaux* and Joshua Denbeaux*

An interim report

EXECUTIVE SUMMARY

The media and public fascination with who is detained at Guantanamo and why has been fueled in large measure by the refusal of the Government, on the grounds of national security, to provide much information about the individuals and the charges against them. The information available to date has been anecdotal and erratic, drawn largely from interviews with the few detainees who have been released or from statements or court filings by their attorneys in the pending *habeas corpus* proceedings that the Government has not declared "classified."

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* The authors are counsel for two detainees in Guantanamo.

This Report is the first effort to provide a more detailed picture of who the Guantanamo detainees are, how they ended up there, and the purported bases for their enemy combatant designation. The data in this Report is based entirely upon the United States Government's own documents.[1] This Report provides a window into the Government's success detaining only those that the President has called "the worst of the worst."

Among the data revealed by this Report:

1. Fifty-five percent (55%) of the detainees are not determined to have committed any hostile acts against the United States or its coalition allies.

2. Only 8% of the detainees were characterized as al Qaeda fighters. Of the remaining detainees, 40% have no definitive connection with al Qaeda at all and 18% are have no definitive affiliation with either al Qaeda or the Taliban.

3. The Government has detained numerous persons based on mere affiliations with a large number of groups that in fact, are not on the Department of Homeland Security terrorist watchlist. Moreover, the nexus between such a detainee and such organizations varies considerably. Eight percent are detained because they are deemed "fighters for;" 30% considered "members of;" a large majority—60%—are detained merely because they are "associated with" a group or groups the Government asserts are terrorist organizations. For 2% of the prisoners their nexus to any terrorist group is unidentified.

4. Only 5% of the detainees were captured by United States forces. 86% of the detainees were arrested by either Pakistan or the Northern Alliance and turned over to United States custody. This 86% of the detainees captured by Pak-

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[1] See, Combatant Status Review Board Letters, Release date January 2005, February 2005, March 2005, April 2005 and the Final Release available at the Seton Hall Law School library, Newark, NJ.

istan or the Northern Alliance were handed over to the United States at a time in which the United States offered large bounties for capture of suspected enemies.

5. Finally, the population of persons deemed not to be enemy combatants—mostly Uighers—are in fact accused of more serious allegations than a great many persons still deemed to be enemy combatants.

INTRODUCTION

The United States Government detains over 500 individuals at Guantanamo Bay as so-called "enemy combatants." In attempting to defend the necessity of the Guantanamo detention camp, the Government has routinely referred this group as "the worst of the worst" of the Government's enemies.[2] The Government has detained most these individuals for more than four years; only approximately 10 have been charged with any crime related to violations of the laws of war. The rest remain detained based on the Government's own conclusions, without prospect of a trial or judicial hearing. During these lengthy detentions, the Government has had sufficient time for the Government to conclude whether, in fact, these men were enemy combatants and to document its rationale.

On March 28, 2002, in a Department of Defense briefing, Secretary of Defense Donald Rumsfeld said:

> As has been the case in previous wars, the country that takes prisoners generally decides that they would prefer

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[2] The Washington Post, in an article dated October 23, 2002 quoted Secretary Rumsfeld as terming the detainees "the worst of the worst." In an article dated December 22, 2002, the Post quoted Rear Adm. John D. Stufflebeem, Deputy Director of Operations for the Joint Chiefs of Staff, "They are bad guys. They are the worst of the worst, and if let out on the street, they will go back to the proclivity of trying to kill Americans and others." Donald Rumsfeld Holds Defense Department Briefing. (2002, March 28). FDCH Political Transcripts. Retrieved January 10, 2006 from Lexis-Nexis database.

> them not to go back to the battlefield. They detain those enemy combatants for the duration of the conflict. They do so for the very simple reason, which I would have thought is obvious, namely to keep them from going right back and, in this case, killing more Americans and conducting more terrorist acts.[3]

The Report concludes, however, that the large majority of detainees never participated in any combat against the United States on a battlefield. Therefore, while setting aside the significant legal and constitutional issues at stake in the Guantanamo litigation presently being considered in the federal courts, this Report merely addresses the factual basis underlying the public representations regarding the status of the Guantanamo detainees.

Part I of this Report describes the sources and limitations of the data analyzed here. Part II describes the "findings" the Government has made. The "findings" in this sense, constitutes the Government's determination that the individual in question is an enemy combatant, which is in turn based on the Government's classifications of terrorist groups, the asserted connection of the individual with the purported terrorist groups, as well as the commission of "hostile acts," if any, that the Government has determined an individual has committed. Part III then examines the evidence, including sources for such evidence, upon which the Government has relied in making these findings. Part IV addresses the continued detention of individuals deemed *not* to be enemy combatants, comparing the Government's allegations against such persons to similar or more serious allegations against persons still deemed to be "enemy combatants."

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[3] Threats and Responses: The Detainees; Some Guantanamo Prisoners Will Be Freed, Rumsfeld Says, (2002, October 23). The New York Times, p 14. Retrieved February 7, 2006 from Lexis-Nexis database.

I. THE DATA

The data in this Report are based on written determinations the Government has produced for detainees it has designated as enemy combatants.[4] These written determinations were prepared following military hearings commenced in 2004, called Combatant Status Review Tribunals, designed to ascertain whether a detainee should continue to be classified as an "enemy combatant." The data are obviously limited.[5] The data are framed in the Government's terms and therefore are no more precise than the Government's categories permit. Finally, the charges are anonymous in the sense that the summaries upon which this interim report relies are not identified by name or ISN for any of the prisoners. It is therefore not possible at this time to determine which summary applies to which prisoner.

Within these limitations, however, the data are very powerful because they set forth the best case for the status of the individuals the Government has processed. The data reviewed are the documents prepared by the Government containing the evidence upon which the Government relied in making its decision that these detainees were enemy combatants. The Report assumes that the information contained in the CSRT

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[4] The files reviewed are available at the Seton Hall Law School library, Newark, NJ.

[5] There is other data currently being compiled based on different information. Each prisoner at Guantanamo who has had summaries of evidence filed against them has had an internal administrative evaluation of the charges. The process is that a Combatant Status Review Tribunal, or CSRT, has received the charges and considered them. Some of those enemy detainees who are represented by counsel in pending habeas corpus Federal District Courts have received (when so ordered by the Federal District Court Judge) the classified and declassified portion of the CSRT proceedings. The CSRT proceedings are described as CSRT returns. The declassified portion of those CSRT returns are being reviewed and placed into a companion data base.

Summaries of Evidence is an accurate description of the evidence relied upon by the Government to conclude that each prisoner is an enemy combatant.

Such summaries were filed by the Government against each individual detainee's in advance of the Combatant Status Review Tribunal (CRST) hearing.

II. THE GOVERNMENT'S FINDINGS OF ENEMY COMBATANT STATUS

A. Structure of the Government's Findings

As to each detainee, the Government provides what it denominates as a "summary of evidence." Each summary contains the following sentence:

> The United States Government has *previously determined* that the detainee is an enemy combatant. This determination is based on information possessed by the United States that indicates that the detainee is. . . .

[Emphasis supplied]

Since the Government had "previously determined" that each detainee at Guantanamo Bay was an enemy combatant before the CSRT hearing, the "summary of evidence" released by the Government is not the Government's *allegations* against each detainee but a summary of the Government's *proofs* upon which the Government found that each detainee, is in fact, an enemy combatant.

Each summary of evidence has four numbered paragraphs. The first[6] and fourth[7] are jurisdictional. The sec-

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[6] Paragraph 1: "Under the provisions of the Department of the Navy Memorandum, dated 29 July 2004, *Implementation of Combatant Status Review Tribunal Procedures for enemy Combatants Detained at Guantanamo Bay Naval Base Cuba*, a Tribunal has been appointed to review the detainee's designation as an enemy combatant."

[7] Paragraph 4: "The detainee has the opportunity to contest his deter-

ond[8] paragraph states the Government's definition of "enemy combatant" for the purpose of the CSRT proceedings.

The third paragraph summarizes the evidence that satisfied the Government that each detainee is an enemy combatant. Paragraph 3(a) is the Government's determination of the detainee relationship with a "defined terrorist organization."[9] Paragraph 3(b) is the place in which Government's finds that a detainee has or has not committed "hostile acts" against U. S. or coalition forces.

Forty five percent of the time the Government concluded that the detainee committed 3(b) hostile acts against United States or coalition forces. In those cases, there is a paragraph 3(b) ("¶3(b)") in the CSRT summary so stating. Fifty five percent of the time, the Government concluded that the detainee did not commit such an act and omitted the entire ¶3 (b) section from the CSRT summary. For these detainees whose CSRT summaries include a finding under ¶3(b), the Government listed its specific findings 'proving' hostile acts in a brief series of sub-paragraphs. Of those CSRT summaries that contain a ¶3(b) "hostile acts" determination, the mean number of subparagraphs is two; that is, for the 55% of

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mination as an enemy combatant. The Tribunal will endeavor to arrange for the presence of any reasonably available witnesses or evidence that the detainee desires to call or introduce to prove that he is not an enemy combatant. The Tribunal President will determine the reasonable availability of evidence or witnesses."

[8] Paragraph 2: "(A)n Enemy Combatant has been defined as: [A]n individual who was part of *or* supporting the Taliban *or* al Qaeda forces, *or* associated forces that are engaged in hostilities against the United States *or* its coalition partners. This includes any person who committed a belligerent act *or* has directly supported hostilities in aid of enemy forces." [Emphasis supplied]

[9] Many of the "defined terrorist organizations" referenced in the CSRT summaries of evidence are not considered terrorist organizations by the Department of Homeland Security. See *Infra*.

detainees the Government has found committed ¶3(b) "hostile acts" the Government lists, on average two pieces of evidence. Fewer than 2% of all 517 CSRT summaries contained more than five ¶3(b) sub-paragraphs; while the vast majority contained 1, 2 or 3 such 'proofs' of hostile acts.

B. The Definition of an 'Enemy Combatant'

For the purposes of the Combatant Status Review Tribunal, an "enemy combatant" has been defined as:

> [A]n individual who was part of *or* supporting the Taliban *or* al Qaeda forces, *or* associated forces that are engaged in hostilities against the United States *or* its coalition partners. This includes any person who committed a belligerent act *or* has directly supported hostilities in aid of enemy forces.[10]

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[10] The definition of "enemy combatants" for the purpose of the Guantanamo detainment has evolved over time. In January 2002, when the first detainees were sent from Pakistan and Afghanistan to Cuba they were termed, as were the detainees in *Ex Parte Quirin*, (47 F.Supp. 431) "unlawful belligerents." In *Hamdi v. Rumsfeld*, (542 U.S. 507) the Government defined "enemy combatant" far more narrowly as someone who was "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan *and* who 'engaged in an armed conflict against the United States' there." Later, in response to *Rasul v. Bush* (542 U.S. 466), the detainees were called "enemy combatants." (Emphasis supplied)

In February 2004, Secretary Rumsfeld, said, "The circumstances in which individuals are apprehended on the battlefield can be ambiguous, as I'm sure people here can understand. This ambiguity is not only the result of the inevitable disorder of the battlefield; it is an ambiguity created by enemies who violate the laws of war by fighting in civilian clothes, by carrying multiple identification documentations, by having three, six, eight, in one case 13 different . . . aliases. . . . Because of this ambiguity, even after enemy combatants are detained, it takes time to check stories, to resolve inconsistencies or, in some cases, even to get the detainee to provide any useful information to help resolve the circumstance."

In an August 13, 2004 News Briefing, Gordon England, Secretary of the Navy and Secretary Rumsfeld's designee for the tribunal process at

This could be interpreted alternatively as requiring either a combatant be *both* a member of prohibited group *and* engaged in hostilities against the U. S. or coalition forces *or* only that a combatant be anyone *either* a member of prohibited group *or* engaged in hostilities to U. S. or coalition forces. Indeed, under this definition, one could be detained for an undefined level of "support of" groups considered hostile to the United States or its coalition partners.

C. Categories of Evidence Supporting Enemy Combatant Designation

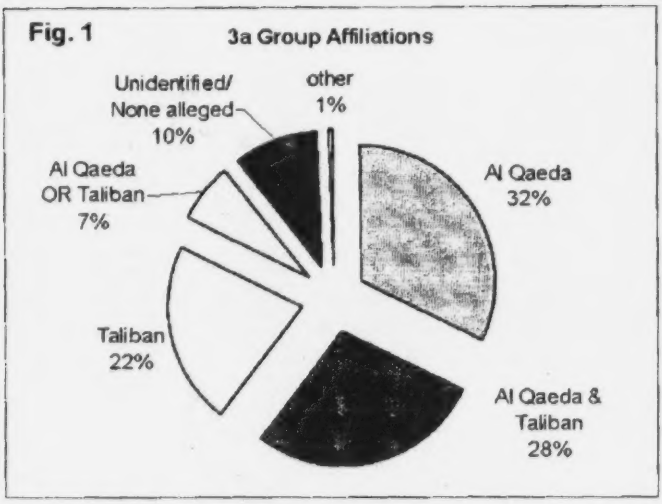
The Government divides the evidence against detainees into two sections: a ¶3(a) nexus with prohibited organizations and a ¶3(b) participation in military operations or commission of hostile acts. Paragraph 3 always begins with the allegations that each detainee met all the requirements contained in the definition of paragraph two. More often than not the Government finds that the detainees did not commit the hostile or belligerent acts.

1. ¶3(a): Enemy Combatant because of Nexus with Prohibited Organization

a. Definition of Prohibited Organizations

The data reveals that the Government divides a detainee's enemy combatant status into six distinct categories that describe the terrorist organization with whom the detainee is affiliated. Figure 1 illustrates the breakdown of each group's representation by the data:

Guantanamo stated that, "The definition of an enemy combatant is in the implementing orders, which have been passed out to everyone. But, in short, it means anyone who is part of supporting the Taliban or al Qaeda forces or associated forces engaging in hostilities against the United States or our coalition partners."



1. al Qaeda (32%)
2. al Qaeda & Taliban (28%)
3. Taliban (22%)
4. al Qaeda OR Taliban (7%)
5. Unidentified Affiliation (10%)
6. Other (1%)

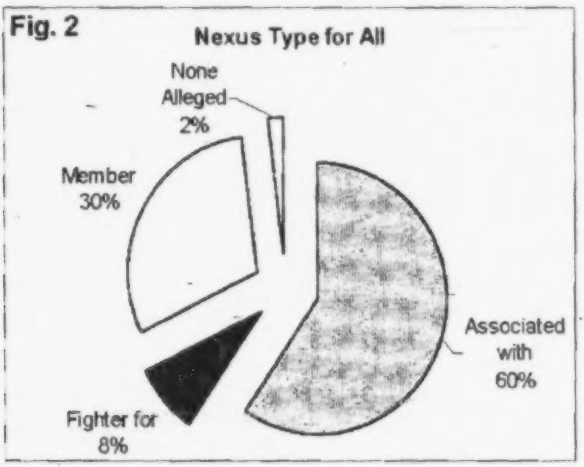
The CSRT Summary of Evidence provides no way to determine the difference between "unidentified/none alleged" and "other" and no explanation for why there are separate categories for both "al Qaeda *and* Taliban" and "al Qaeda *or* Taliban."

If, after four years of detention, the Government is unable to determine if a detainee is either al Qaeda or Taliban, then it is reasonable to conclude that the detainee is neither. Under this assumption, the data reveals that 40% of the detainees are not affiliated with al Qaeda and 18% percent of the detainees are not affiliated with either al Qaeda or the Taliban.

b. Nexus with the Identified Organization

The Government also describes each prisoner's nexus to the respective organization: "fighter for;" "member of;" and

"associated with." The data explain that there are three main degrees of connection between the detainee and the organization with which he is connected.[11]



1. "Fighters for"
2. "Members of"
3. "Associated with"

Figure 2 illustrates that of the nexus type for all the prisoners, regardless of the group to which they are "connected," by far the greatest number of prisoners are identified only as being "associated with" one group or another. A much smaller percentage—30%—is identified as "members of." Only 8% are classified as "fighters for."

The definition of "fighters for" would seem to be obvious, while definitions of "members of" and "associated with" are less clear and could justify a very broad level of attenuation. According to the Government's expert on al Qaeda mem-

[11] While more than 95% of the summaries of the evidence used one of these three categories, approximately 4% used other nexus descriptions. Most notably, 2% used a "supported" descriptor which was re-categorized as "associated with." See Appendix C for a full account of recategorizations of data.

bership, Evan Kohlman, simply being told that one had been selected as a member would qualify one as a member:

> Al-Qaeda leaders could dispatch one of their own—someone who is not top tier . . . to recruit someone and to tell them, I have been given a mandate to do this on behalf of senior al-Qaeda leaders . . . even though perhaps this individual has never sworn an official oath and this person has never been to an al-Quaeda training camp, nor have they actually met, say, Osama bin Ladin.[12]

This expansive definition of membership in al Qaeda could thus be applied to anyone who the Government believed ever spoke to an al Qaeda member. Even under this broad framework, the Government concluded that a full 60% of the detainees do not have even that minimum level of contact with an al Qaeda member.

Membership in the Taliban is different and also not clearly defined. According to the Government, one can be a conscripted (and therefore presumably unwilling) member of the Taliban and still be an enemy combatant.

Figures 3 and 4 compare the nexus between enemy combatants with Al Qaeda and the Taliban. In contrast to the "al Qaeda only" category, the "Taliban only" category shows that a significantly higher percentage of the prisoners are designated "members of" and "fighters for" with a reduced number being "associated with."

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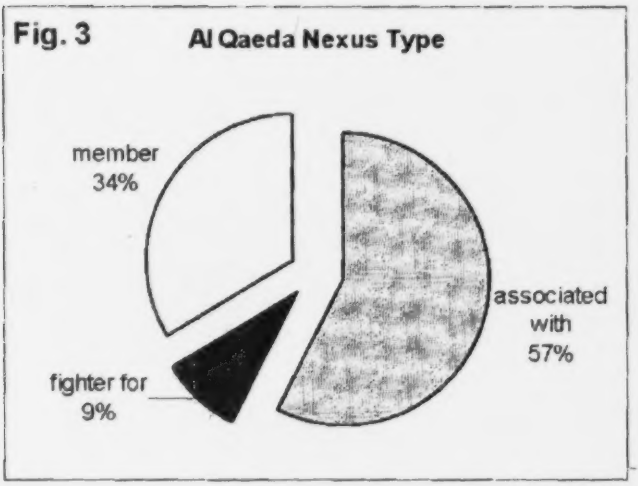
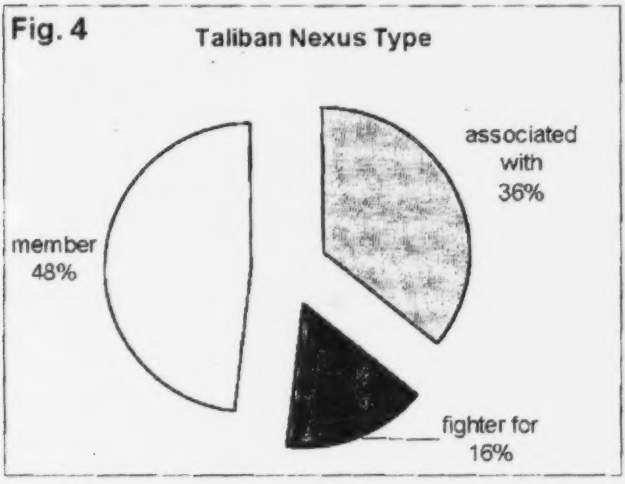
[12] *US vs. Pachir*, Dkt. No., T113.





Seventy eight percent of those prisoners who are identified as being both "al Qaeda and Taliban" are merely "associated with;" 19% are "members of;" and 3% are "fighters for." (Fig. 5) When the Government cannot specifically identify a detainee as a member of one or the other, al Qaeda or the Taliban, the degree of connection attributed to such detainees appears tenuous. (Fig. 6) recognizes that more often than not members of the Taliban are not members of al Qaeda. The Government categorizes as stand alone al Qaeda or stand

alone Taliban more than 54% of the detainees, and only 28% of the detainees as members of both.

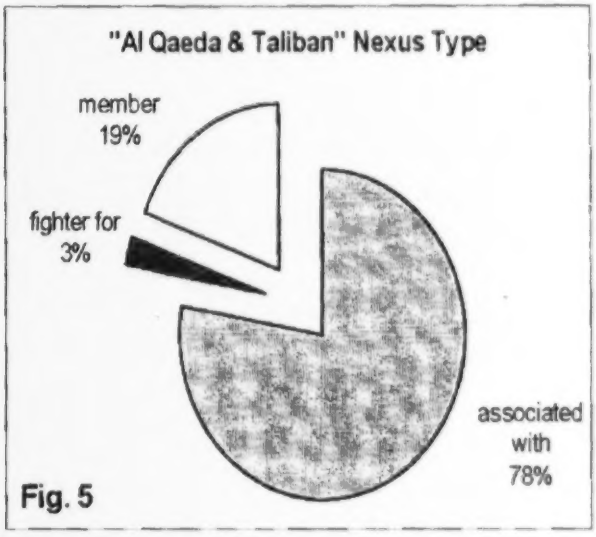


Fig. 5

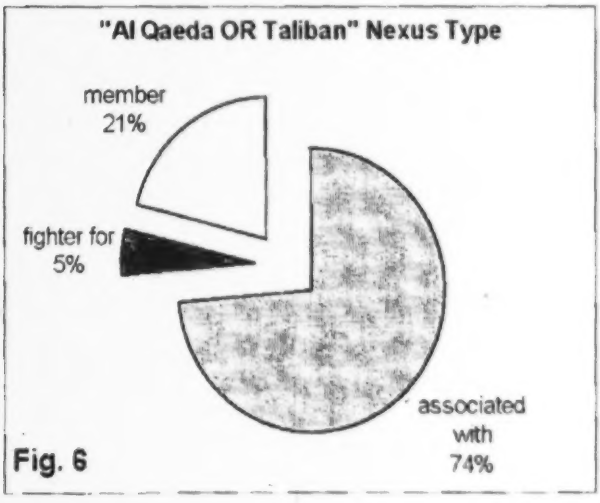


Fig. 6

The data provides no explanation for the explicit distinction between those persons identified as being connected to "al Qaeda *and* the Taliban" as opposed to "al Qaeda *or* the Taliban". [Emphasis supplied]

2. ¶ 3(b): The Government's Findings on Detainees' 3(b) Hostile Acts against the United States or Coalition Forces

Although the Government's public position is that these detainees are "the worst of the worst," s*ee supra* note 2, the data demonstrates that the Government has already concluded that a majority of those who continue to be detained at Guantanamo have no history of any 3(b) hostile act against the United States or its allies.

According to the Government, fewer than half of the detainees engaged in 3(b) hostile acts against the United States or any members of its coalition. As figure 7 depicts, the Government has concluded that no more than 45% of the detainees have committed some 3(b) hostile act.

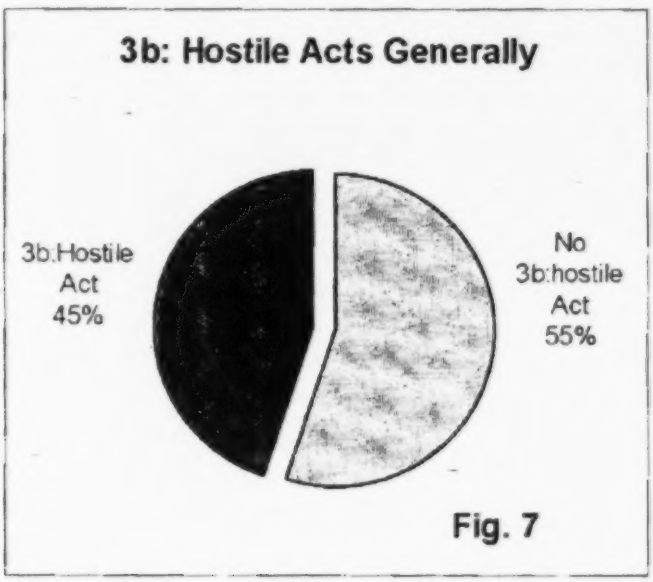


Fig. 7

This is true even though the Government's definition of a 3(b) hostile act is not demanding. As an example, the following was the evidence that the Government determined was sufficient to constitute a 3(b) hostile act:

The detainee participated in military operations against the United States and its coalition partners.

1. The detainee *fled*, along with others, when the United States forces bombed their camp.

2. The detainee was captured in Pakistan, along with other Uigher fighters.[13]

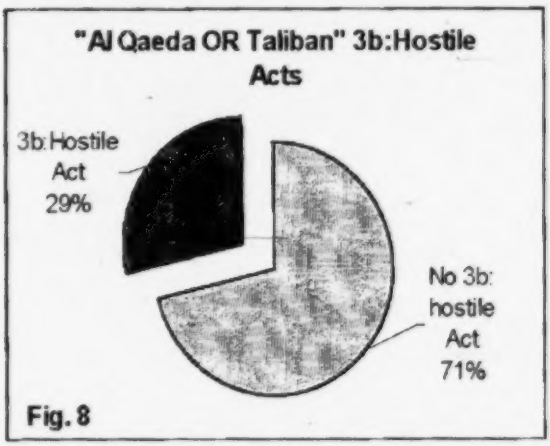


Fig. 8

Cross-analyzing the ¶3(a) and ¶3(b) data, individuals in some groups are less likely to have committed hostile acts than those in others. In the group "al Qaeda *or* Taliban," for example, 71% of the detainees have not been found to have committed any hostile act. (See Fig. 8)

Of the "other" detainees in Figure 9, that is, the 18% whose 3(a) is either "Unidentified", "None alleged", "al Qaeda OR Taliban" or "other," only 24% have been determined to have committed a 3(b) hostile act. (See Fig 10)

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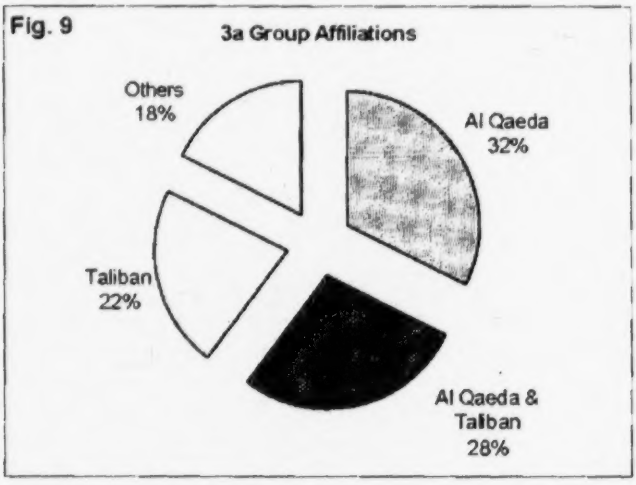
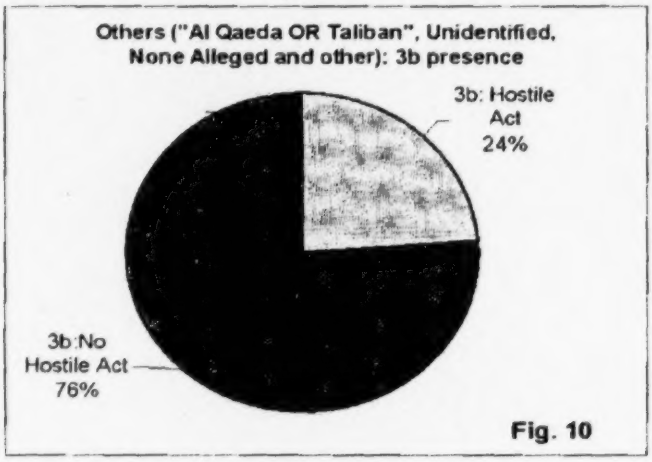
[13] See CSRT Summary of Evidence available at the Seton Hall Law School library, Newark, NJ [Emphasis supplied].



Thus, the less clear the Government's characterization of a detainee's affiliation with a prohibited group is, the less likely the detainee is to have committed a hostile act. This is notable because the percentage of detainees with whom the Government cannot clearly connect with a prohibited group is so large.[14]



[14] See Fig. 1: "3(a) Group Affiliations" supra, p. 7: the sum of "al Qaeda OR Taliban" (7%); Unidentified/"None alleged" (10%); and "Other" (1%) equals 18%. This is the 18% that is represented as "Others" in Fig. 9.

The same pattern holds true when the degree of connection between the detainee and the affiliated group lessens. Thirty-two percent of the detainees are stand alone al Qaeda. Fifty seven percent of those detainees have a nexus to al Qaeda described as "associated with." Of those 57% whom are merely associated with al Qaeda, 72% of them have not committed 3(b) hostile acts. (See Fig. 3 and 11) Thus, the data illustrates that not only are the majority of the al Qaeda detainees merely "associated with" al Qaeda, but the Government concludes that a substantial percentage of those detainees did not commit 3(b) hostile acts.

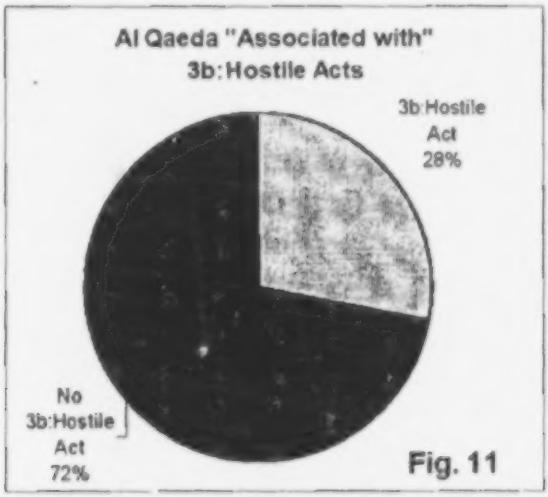


Fig. 11

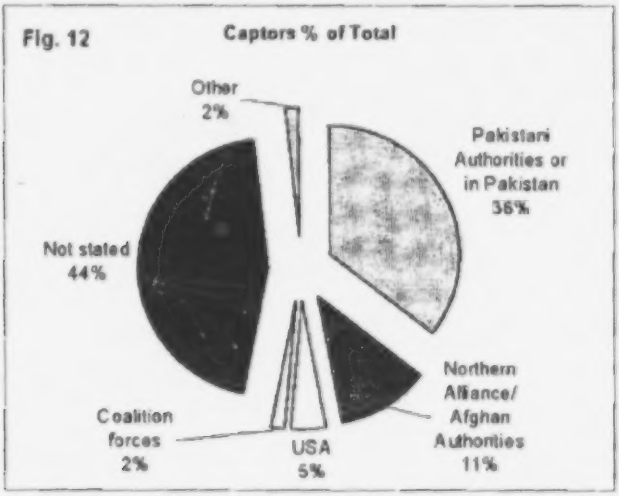
III. THE GOVERNMENT'S EVIDENCE THAT THE DETAINEES ARE ENEMY COMBATANTS

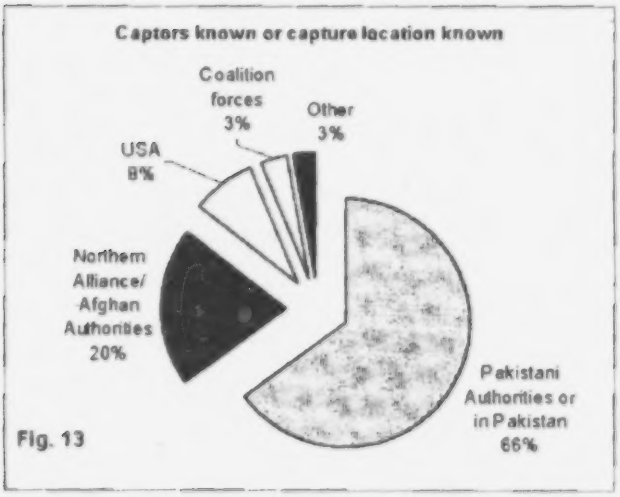
The data permit at least some answers to two questions: How was the evidence of their enemy combatant status obtained? What evidence does the Government have as to the detainees commission of 3(b) violations?

A. Sources of Detainees and Reliability of the Information about Them

Figure 12 explains who captured the detainees. Pakistan was the source of at least 36% of all detainees, and the

Afghanistan Northern Alliance was the source of at least 11 % more. The pervasiveness of Pakistani involvement is made clear in Figure 13 which shows that of the 56% whose captor is identified, 66% of those detainees were captured by Pakistani Authorities or in Pakistan. Thus, if 66% of the unknown 44% were derived from Pakistan, the total captured in Pakistan or by Pakistani Authorities is fully 66%.





Since the Government presumably knows which detainees were captured by United States forces, it is safe to assume

that those whose providence is not known were captured by some third party. The conclusion to be drawn from the Government's evidence is that 93% of the detainees were not apprehended by the United States.[15] (See Fig. 12) Hopefully, in assessing the enemy combatant status of such detainees, the Government appropriately addressed the reliability of information provided by those turning over detainees although the data provides no assurances that any proper safeguards against mistaken identification existed or were followed.

The United States promised (and apparently paid) large sums of money for the capture of persons identified as enemy combatants in Afghanistan and Pakistan. One representative flyer, distributed in Afghanistan, states:

> Get wealth and power beyond your dreams. . . . You can receive millions of dollars helping the anti-Taliban forces catch al-Qaida and Taliban murders. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people.[16]

Bounty hunters or reward-seekers handed people over to American or Northern Alliance soldiers in the field, often soon after disappearing;[17] as a result, there was little opportunity on the field to verify the story of an individual who presented the detainee in response to the bounty award. Where that story constitutes the sole basis for an individual's detention in Guantanamo, there would be little ability either

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[15] Presuming a fixed 7% of detainees were captured by US or coalition forces, the remaining detainees whose captor is unknown can be extrapolated to 68% "Pakistani Authorities or in Pakistan", 21% "Northern Alliance/Afghan Authorities", and 4% "other."

[16] *See Infra.*, Appendix A.

[17] *See, e.g.* Mahler, Jonathan, The Bush Administration versus Salim Hamdan (2006, Jan. 8), *New York Times*, p. 44.

for the Government to corroborate or a detainee to refute such an allegation.

As shall be seen in consideration of the Uighers, the Government has found detainees to be enemy combatants based upon the information provided by the bounty hunters. As to the Uighers, at least, there is no doubt that bounties were paid for the capture and detainment of individuals who were not enemy combatants.[18] The Uigher have yet to be released.

The evidence satisfactory to the Government for some of the detainees is formidable. For this group, the Government's evidence portrays a detainee as a powerful, dangerous and knowledgeable man who enjoyed positions of considerable power within the prohibited organizations. The evidence against them is concrete and plausible. The evidence provided for most of the detainees, however, is far less impressive.

The summaries of evidence against a small number of detainees indicate that some of the prisoners played important roles in al Qaeda. This evidence, on its face, seems reliable. For instance, the Government found that 11% of the detainees met with Bin Laden. Other examples include:

- A detaineee who is alleged to have driven a rocket launcher to combat against the Northern Alliance.
- A detainee who held a high ranking position in the Taliban and who tortured, maimed, and murdered Afghani nationals who were being held in Taliban jails
- A detainee who was present and participated in al Qaeda meetings discussing the September 11th attacks before they occurred.

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[18] White, Josh and Robin Wright. Detainee Cleared for Release Is in Limbo at Guantanamo. (2005, December 15), *Washington Post*, p. A09.

- A detainee who produced al Qaeda propaganda, including the video commemorating the USS Cole attack.
- A detaineee who was a senior al Qaeda lieutenant.
- 11 detainees who swore an oath to Osama Bin Laden.

The previous examples are atypical of the CSRT summaries. There are only a very few individuals who are actively engaged in any activities for al Qaeda and for the Taliban.

The 11 detainees who swore an oath to Osama Bin Laden are only a tiny fraction of the total number of the detainees at Guantanamo.

The Taliban is a different story.

The Taliban was a religious state which demanded the most extreme compliance of all of its citizens and as such controlled all aspects of their lives through pervasive Governmental and religious operation.[19] Under Mullah Omar, there were 11 governors and various ministers who dealt with such various issues as permission for journalists to travel, overseeing the dealings between the Taliban and NGOs for UN aid projects and the like.[20] By 1997, all international "aid projects had to receive clearance not just from the relevant ministry, but also from the ministries of Interior, Public Health, Police, and the Department of the Promotion of Virtue and Prevention of Vice."[21] There was a Health Minister, Governor of the State Bank, an Attorney General, an Education Minister, and an Anti-Drug Control Force.[22] Each

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[19] *See generally* Rashid, A. (2001). *Taliban.* Yale University Press.

[20] *See Id.*, p. 99.

[21] *See Id.*, p. 114.

[22] *See generally* Rashid, A. (2001). *Taliban.* Yale University Press.

city had a mayor, chief of police, and senior administrators.[23]

None of these individuals are at Guantanamo Bay.

The Taliban detainees seem to be people not responsible for actually running the country. Many of the detainees held at Guantanamo were involved with the Taliban unwillingly as conscripts or otherwise.

General conscription was the rule, not the exception, in Taliban controlled Afghanistan.[24] "All the warlords had used boy soldiers, some as young as 12 years old, and many were orphans with no hope of having a family, or education, or a job, except soldiering."[25]

Just as strong evidence proves much, weak evidence suggests more. Examples of evidence that the Government cited as proof that the detainees were enemy combatants includes the following:

- Associations with unnamed and unidentified individuals and/or organizations;
- Associations with organizations, the members of which would be allowed into the United States by the Department of Homeland Security;
- Possession of rifles;
- Use of a guest house;
- Possession of Casio watches; and
- Wearing of olive drab clothing.

The following is an example of the entire record for a detainee who was conscripted into the Taliban:

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[23] *Id.*

[24] *See Id.*, p 100.

[25] *See Id.*, p 109.

a. Detainee is associated with the Taliban

   i. The detainee indicates that he was conscripted into the Taliban.

b. Detainee engaged in hostilities against the US or its coalition partners.

   i. The detainee admits he was a cook's assistant for Taliban forces in Narim, Afghanistan under the command of Haji Mullah Baki.

   ii. Detainee fled from Narim to Kabul during the Northern Alliance attack and surrendered to the Northern Alliance.[26]

All declassified information supports the conclusion that this detainee remains at Guantanamo Bay to this date.

Other detainees have been classified as enemy combatants because of their association with unnamed individuals. A typical example of such evidence is the following:

> The detainee is associated with forces that are engaged in hostilities against the United States and its coalition partners:
>
> 1) The detainee voluntarily traveled from Saudi Arabia to Afghanistan in November 2001.
>
> 2) The detainee traveled and shared hotel rooms with an Afghani.
>
> 3) The Afghani the detainee traveled with is a member of the Taliban Government.
>
> 4) The detainee was captured on 10 December 2001 on the border of Pakistan and Afghanistan.[27]

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[26] See CSRT Summary of Evidence available at the Seton Hall Law School library, Newark, NJ.

[27] See CSRT Summary of Evidence available at the Seton Hall Law School library, Newark, NJ.

Some of these detainees were found to be enemy combatants based on their association with identified organizations which themselves are not proscribed by the Department of Homeland Security from entering the United States. In analyzing the charges against the detainees, the Combatant Status Review Board identified 72 organizations that are used to evidence links between the detainees and al Qaeda or the Taliban.

These 72 organizations were compared to the list of Foreign Terrorist Organizations in the Terrorist Organization Reference Guide of the U.S. Department of Homeland Security, U.S. Customs and Border Protection and the Office of Border Patrol. This Reference Guide was published in January of 2004 which was the same year in which the charges were filed against the detainees.[28] According to the Reference Guide, the purpose of the list is "to provide the Field with a 'Who's Who' in terrorism."[29] Those 74 foreign terrorist organizations are classified in two groups: 36 "designated foreign terrorist organizations," as designated by the Secretary of State, and 38 "other terrorist groups," compiled from other sources.

Comparing the Combatant Status Review Board's list of 72 organizations that evidence the detainee's link to al Qaeda

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[28] Terrorist Organization Reference Guide. Retrieved February 6, 2006 from http://www.mipt.org/pdf/TerroristOrganizationReferenceGuide.pdf

[29] It continues: "The main players and organizations are identified so the CBP [Customs and Border Protection] Officer and BP [Border Protection] Agent can associate what terror groups are from what countries, in order to better screen and identify potential terrorists." Unlike the many other compilations of terrorist organizations published by the Government since 9/11, including the list of the Office of Foreign Asset Control (OFAC) used to monitor or block international funds transfers to suspected and known terrorist organizations and their supporters, the Terrorist Organization Reference Guide identifies the 74 "main players and organizations" in terrorism.

and/or the Taliban, only 22% of those organizations are included in the Terrorist Organization Reference Guide. Further, the Reference Guide describes each organization, quantifies its strength, locations or areas of operation, and sources of external aid. Based on these descriptions of the organizations, only 11% of all organizations listed by the Combatant Status Review Board as proof of links to al Qaeda or the Taliban are identified as having any links to Qaeda or the Taliban in the Terrorist Organization Reference Guide.

Only 8% of the organizations identified by the Combatant Status Review Board even target U.S. interests abroad.

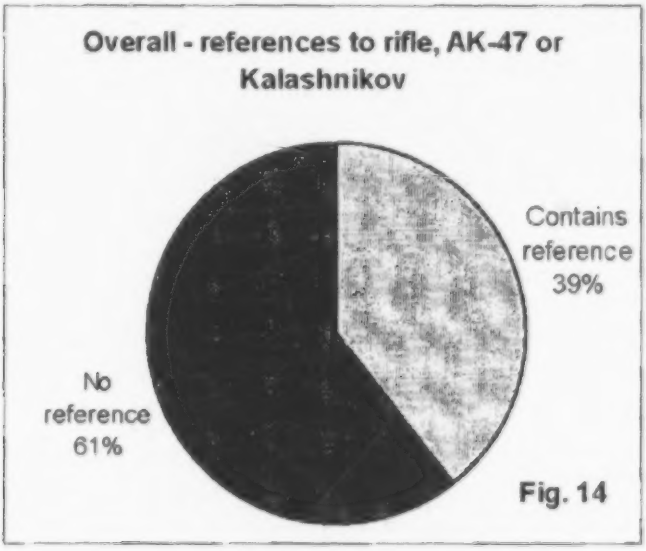

Fig. 14

The evidence against 39% of the detainees rests in part upon the possession of a Kalashnikov rifle.

Possession of a rifle in Afghanistan does s not distinguish a peaceful civilian from any terrorist. The Kalashnikov culture permeates both Afghanistan and Pakistan.[30]

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[30] Afghanistan is also the world's center for unaccounted weapons; thus, there is no exact count on the number of weapons in circulation. Arms experts have estimated that here are at least 10 million small arms in

Our economy has been suffering and continues to suffer because of the situation in Afghanistan. Rampant terrorism as well as the culture of drugs and guns—that we call the "Kalashnikov Culture"—tearing apart our social and political fabric—was also a direct legacy of the protracted conflict in Afghanistan.[31]

This is recognized not merely by the Pakistani Foreign minister but by American college students touring Afghanistan. "There is a big Kalashnikov-rifle culture in Afghanistan: . . . I was somewhat bemused when I walked into a restaurant this afternoon to find Kalashnikovs hanging in the place of coats on the rack near the entrance, ..."[32]

The Government treats the presence at a "guest house" as e evidence of being an enemy combatant. The evidence against 27% of the detainees included their residences while traveling through Afghanistan and Pakistan.

Stopping at such facilities is common for all people traveling in the area. In the region, the term guest house refers simply to a form of travel accommodation.[33] Numerous travel and

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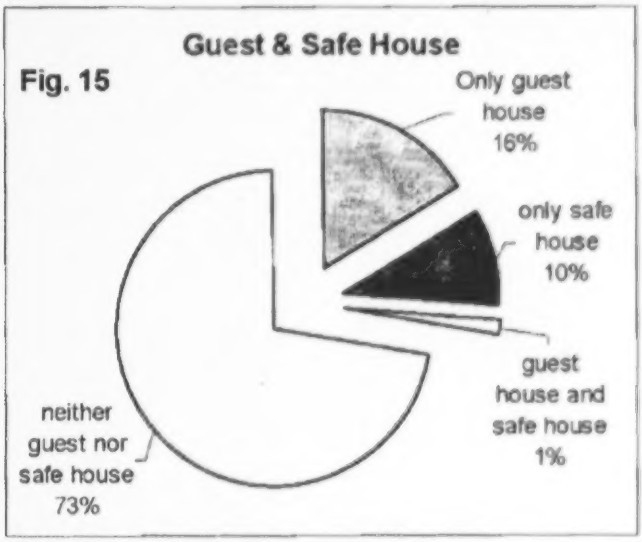
the country. The arms flow has included Soviet weapons funneled into the country during the 1979 invasion, arms from Pakistan supplied to the Taliban, and arms from Tajikistan that equipped the Northern Alliance. NEA's Statements on Afghanistan and the Taliban. Retrieved February 6, 2006 from http://neahin.org/programs/schoolsafety/september11 /materials/nmncapos.htm.

[31] Pakistan Mission to the United Nations, New York. Retrieved February 6, 2006 from http://www.un.int/pakistan/12011220.html.

[32] Hall, B. (2002 Nov.-Dec.) Letters from Afghanistan. *Duke Magazine*. Retrieved February 6, 2006, from www.dukemagazine.duke.edu/dukemag/issues/111202/afghan1.html.

[33] A June 7, 2005 article in Business Week referenced an Afghani woman named Mahboba who hopes to open a chain of women's guest houses, gaining assistance from participation in a program sponsored by the Business Council for Peace. In an article published September 25, 2005, New York Times travel reporter, Paul Tough, described the guest

tourism agencies, such as Worldview Tours, South Travels, and Adventure Travel include overnight stays at local guest houses and rest houses on their tour package itineraries and lists of accommodations, which are marketed to western tourists.[34] Guesthouses and rest houses typically offer budget rates and breakfast American travel agents advise American tourists to expect to stay in guest houses in either country.



In a handful of cases the detainee's possession of a Casio watch or the wearing olive drab clothing is cited as evidence that the detainee is an enemy combatant. No basis is given to

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houses that he and his girlfriend stayed in while he explored the budding tourism industry in Afghanistan. Perman, Staci. Aiding Afghanistan with Style. (2005, June 7). *Business Week Online.* Retrieved January 11, 2006 from http://www.businessweek.com/smallbiz/content/jun2005/sb2005067_5111_sb013.htm. Tough, Paul. The Reawakening. (2005, September 25). *New York Times.*

[34] *See, Services Along the Silk Road: Accommodations.* Retrieved January 10, 2006, from http://worldviewtours.com/service/accomodation.htm; *Adventure Travel Trek and Tour Operators.* Retrieved January 10, 2006 from http://www.adventure-touroperator.com/main.html; *Adventure Holiday in Pakistan: Budget Hotels and Guesthouses.* Retrieved January 10, 2006, from http://www.southtravels.com/asia/pakistan/index.html

explain why such evidence makes the detainee an enemy combatant.

IV. CONTINUED DETENTION OF NON-COMBATANTS

The most well recognized group of individuals who were held to be enemy combatants and for whom summaries of evidence are available are the Uighers[35] These individuals are now recognized to be Chinese Muslims who fled persecution in China to neighboring countries. The detainees then fled to Pakistan when Afghanistan came under attack by the United States after September 11, 2001. The Uighers were arrested in Pakistan and turned over to the United States.

At least two dozen Uighurs found in Afghanistan and Pakistan has been detained in Guantanamo Bay, Cuba. The Government originally determined that these men were enemy combatants, just as the Government so determined for all of the other detainees. The Government has now decided that many of the Uighur detainees in Guantanamo Bay are not enemy combatants and should no longer be detained. They have not yet been released.

The Government has publicly conceded that many of the Uighers were wrongly found to be enemy combatants. The

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[35] Uighurs, a Turkic ethnic minority of 8 to 12 million people primarily located in the northwestern region of China and in some parts of Kyrgyzstan and Kazakhstan, face political and religious oppression at the hands of the Chinese Government. The Congressional Human Rights Caucus of the United States House of Representatives has received several briefings on these issues, including the information that the People's Republic of China "continues to brutally suppress any peaceful political, religious, and cultural activities of Uighurs, and enforce a birth control policy that compels minority Uighur women to undergo forced abortions and sterilizations." (United States Commission on International Religious Freedom, World Uighur Network) In response to oppression by the Chinese Government, many Uighurs flee to surrounding countries such as Afghanistan and Pakistan. Wright, Robin. Chinese Detainees are Men Without a Country. (2005, August 24) Washington Post, p. A01.

question is how many more of the detainees were wrongly found to be enemy combatants. The evidence that satisfied the Government that the Uighers were enemy combatants parallel's the evidence against the other detainees—but the evidence against the Uighers is actually sometimes stronger.

The Uigher evidence parallels the evidence against the other detainees in that they were:

1. Muslims,
2. in Afghanistan,
3. associated with unidentified individuals and/or groups
4. possessed Kalishnikov rifles
5. stayed in guest houses
6. captured in Pakistan
7. by bounty hunters.

If such evidence is deemed insufficient to detain these persons as enemy combatants, the data analyzed by this Report would suggest that many other detainees should likewise not be classified as enemy combatants.

CONCLUSION

The detainees have been afforded no meaningful opportunity to test the Government's evidence against them. They remain incarcerated.

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APPENDIX A

گرانو وطنوالو!

اسلام او تروریزم سخه تاسف دی. راځی چه القاعده د
نړۍ څخه ړنګه کړو او د هغوی پټ ځایونه ومومو.
خبر یې امنیتي ځواکونه وکړئ.

هموطنان عزیز!

اسلام با تروریزم مخالف است. بیایید بخاطر آزادی و
گرفتاری القاعده سعی و تلاش نموده افتخار آنرا
حاصل نماییم.

Image from http://www.psywar.org/apddetailsdb.php?detail=2002NC02

"Dear countrymen: The al Qaeda terrorists are our enemy. They are the enemy of your independence and freedom. Come on. Let us find their most secret hiding places. Search them out and inform the intelligence service of the province and get the big prize." (taken from AP article, http://afgha.com/?af=article&sid=12975

"The reward, about $4,285, would be paid to any citizen who aided in the capture of Taliban or al-Qaida fighters."

Text on the back of the imitation banknote is "Dear countrymen: The al-Qaida terrorists are our enemy. They are the enemy of your independence and freedom. Come on. Let us find their most secret hiding places. Search them out and inform the intelligence service of the province and get the big prize."

http://www.psywarrior.com/Herbafghan02.html

تا ۵ ملیون دالر جائزه در مقابل ارائه معلومات
موثق در باره محل بود و باش و یا دستگیری
رهبران طالبان و القاعده پرداخته میشود.

تر ۵ ملیون دالر جائزه دهغه موثق معلومات دپاره
چه د طالبان او القاعده مشرانو د نیولو او یا
استوګني ځای وښی ورکول کیږي.

Image from http://www.psywar.org/apddetailsdb.php?detail=2002AFD029P

AFD29p—leaflet code. This leaflet shows an unnamed Taliban leader (http://www.psywarrior.com/Herbafghan02.html)

REWARD FOR INFORMATION LEADING TO THE WHEREABOUTS OR CAPTURE OF TALIBAN AND AL QAEDA LEADERSIIIP.

Translation: http://www.psywarrior.com/afghanleaf15.html

App. 236

Afghanistan Leaflets

به هغه اندازه پانګه وګټئ چه د تاسی خوب کی هم نه وی راغلی. د طالبانو
ضد قوا سره مرسته وکړی چه قاتلان او دارده ماران د افغانستان څخه وشړی.

TF11-RP09-1

FRONT

"Get wealth and power beyond your dreams. Help the Anti-Taliban Forces rid Afghanistan of murderers and terrorists"

BACK

TEXT ONLY

"You can receive millions of dollars for helping the Anti-Taliban Force catch Al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people."

From http://www.psywarrior.com/afghanleaf40.html

APPENDIX B

Afghanistan Support Committee
al Birr Foundation
Al Haramain
Al Ighatha
Al Irata
Al Nashiri
Al Wa'ad
Al Wafa
Al-Gama'a al-islamiyya
Algerian Armed Islamic Group
Algerian resistance group
al-Haramayn
Al-Igatha Al-Islamiya, Int'ntl Islamic Relief Org
Al-Islah Reform Party in Yemen
Al-Itiihad al Islami (AIAI)
Ariana Airlines
Armed Islamic Group of Algeria
Bahrain Defense Organization
Chechen rebels
Dawa wa Irshad
East Turkish Islamic Movement
Egyptian Islamic Jihad (EIJ)
Extremist organization linked to Al Qaeda
Fiyadan Islam
Hamas (Islamic Resistance Front)

Harakat-e-Mulavi
HIG
Hizballah
International Islamic Relief Organization (IIRO)
Iraqi National Congress (INC)
Islamic Group Nahzat-Islami
Islamic Movement of Tajikistan
Islamic Movement of Uzbekistan
Islamic Salvation Front
Itihad Islami
JABRI, Wai Al
Jaish-e-mohammad
Jama'at al Tablighi
Jamaat ud Dawa il al Quran al Sunnat (JDQ)
Jamat al Taligh
Jamiat Al Islamiya
Jemaah Ilamiah Mquatilah
Jihadist
Karim Explosive Cell
Kuwaiti Joint Relief Committee
Lajanat Dawa Islamiya (LDI)
Lash ar-e-tayyiba
Lashkar-e-Tayyiba(LT)
LIFG
Maktab al Khidman
Mujahadin

Mujahedin Brigade in Bosnia
Mulahadin
Muslims in Sink'Iang Province of China
Nahzat-Islami
Pacha Khan
Revival of Islamic Heritage Society
Salafist group for call and combat
Sami Essid Network
Samoud
Sanabal Charitable Committee
Sharqawi Abdu Ali al-Hajj
small mudafah in Kandahar
Takfir Seven
Takvir Ve Hijra (TVH)
Talibari
Tarik Nafaz Shariati Muhammedi Molakan Danija
Tunisian Combat Group
Tunisian terrorists
Turkish radical religious groups
Uighers
World Assembly of Muslim Youth
yemeni mujahid

APPENDIX C

"Captured by Whom" Notes

"other" includes "Bosnian Authorities", "Foreign Government", "Gambia", "Iranian Authorities", "Local Pashtun tribe", "natural elders of Andokhoy City" and "United Islamic Front for the Salvation of Afghanis"

"Pakistani Authorities" includes "Pakistani Greentown"

"Where Captured" Notes

"Afghanistan" includes "Mazar-e Sharif" and "Tora Bora"

"other" includes "Bosnia", "fleeing from Shkin firebase", "Gambia", "home of al Qaeda financier", "home of suspected HIG commander", "Iran", "Kashmir", "Libyan guesthouse", "Samoud's compound", "UK, Gambia" and "while being treated for leg wound"

"Affiliation" Notes

al Qaeda includes "al Qaeda or its network"

al Qaeda & Taliban includes "al Qaeda member taliban associate", "al Qaeda/Taliban", "member of al Qaeda & associated with Taliban", "member of Taliban and/or associated w/ al Qaeda", "Taliban and/or al Qaeda", "Taliban Fighter and al Qaeda Member" and "taliban member al Qaeda associate"

"other" includes "HIG" and "Uigher"

Unidentified includes "al Qaeda affiliated group", "enemy combatant", "forces allied with al Qaeda and Taliban", "forces engaged in hostilities against US", "organization associated w/ and supported al Qaeda", "terrorist", "terrorist organization", "terrorist organization tied to al Qaeda", "terrorist organization supported by al Qaeda" and "various NGOs with al Qaeda & Taliban connections"

"Nexus" Notes

"associated with" includes "affiliated", "material support", "supported" and "supporter"

"fighter" for includes "supported and fought for"

"member" includes "member and participated in hostile acts", "member of or associated with", "member or ally", "operative", "part of or supported" and "worked for"

1

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Nos. 06-1195 and 06-1196

In the Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
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KHALED A.F. AL ODAH, NEXT FRIEND OF
FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, removes federal court jurisdiction over habeas petitions filed by aliens detained as enemy combatants at Guantanamo Bay, Cuba.

2. Whether aliens detained as enemy combatants at Guantanamo Bay have rights under the Suspension Clause of Article I, Section 9, of the Constitution.

3. Whether, if aliens detained at Guantanamo Bay have such rights, the MCA violates the Suspension Clause.

4. Whether petitioners may challenge the adequacy of the judicial review available under the MCA and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, before they have sought to invoke, much less exhaust, such review.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
statement 2
Argument 7
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Ahrens v. *Clark*, 335 U.S. 188 (1948) 3
Al Odah v. *United States*, 321 F.3d 1134 (D.C. Cir. 2003), rev'd *sub nom. Rasul* v. *Bush*, 542 U.S. 466 (2004) 3
Braden v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973) 3
Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984) .. 28
Clinton v. *Goldsmith*, 526 U.S. 529 (1999) 15
Cuban Am. Bar Ass'n v. *Christopher*, 43 F.3d 1412 (11th Cir.), cert. denied, 515 U.S. 1142 and 516 U.S. 913 (1995) 21
Felker v. *Turpin*, 518 U.S. 651 (1996) 18
Hamdan v. *Rumsfeld*, 126 S. Ct. 2749 (2006) ... 5, 11, 15, 16
Hamdi v. *Rumsfeld*, 542 U.S. 507 (2004) .. 13, 14, 15, 17, 29
Herrera v. *Collins*, 506 U.S. 390 (1993) 15
INS v. *St. Cyr*, 533 U.S. 289 (2001) 11, 12, 14, 25, 28
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) ..... *passim*
Lockington's Case, Brightly 269 (Pa. 1813) 26

Cases—Continued: Page

Noyd v. *Bond*, 395 U.S. 683 (1969) 15
People's Mojahedin Org. of Iran v. *Department of State*, 182 F.3d 17 (D.C. Cir. 1999), cert. denied, 529 U.S. 1104 (2000) 21, 24
Preiser v. *Rodriguez*, 411 U.S. 475 (1973) 10
Quirin, Ex parte, 317 U.S. 1 (1942) 14, 18
Rasul v. *Bush*, 542 U.S. 466 (2004) ..... *passim*
Rex v. *Cowle*, 97 Eng. Rep. 587 (K.B. 1759) 26
Rex v. *Hastings*, 1 Indian Dec. 1005 (Calcutta S.C. 1775) 26
Rex v. *Mitter*, 1 Indian Dec. 1008 (Calcutta S.C. 1781) .. 26
Rex v. *Schiever*, 97 Eng. Rep. 551 (K.B. 1759) 26
Rose v. *Lundy*, 455 U.S. 509 (1982) 15
Schlesinger v. *Councilman*, 420 U.S. 738 (1975) 15
Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) 25
Swain v. *Pressley*, 430 U.S. 372 (1977) 12, 14
The Case of Three Spanish Sailors, 96 Eng. Rep. 775 (C.P. 1779) 26
United States v. *Hayman*, 342 U.S. 205 (1952) 15
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 20, 24
Yamashita, In re, 327 U.S. 1 (1946) 14, 18
Zadvydas v. *Davis*, 533 U.S. 678 (2001) 20, 25

Constitution, treaties and statutes:

U.S. Const.:
Art. I, § 9, Cl. 2 (Suspension Clause) ..... *passim*

Constitution, treaties and statutes—Continued: Page

Art. III 16
Amend. IV 24
Amend. V 3, 20, 21, 23
Due Process Clause 3
Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, T.S. No. 426 24
Art. III 24
Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, T.S. No. 418 24
Art. II 24
Art. III 24
Treaty on Relations with Cuba, May 29, 1934, U.S.-Cuba, 48 Stat. 1682 24
Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 ..... 4, 28
Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739 2
§ 1005, 119 Stat. 2740 16
§ 1005(a)(3), 119 Stat. 2741 17
§ 1005(e)(1), 119 Stat. 2742 ..... 4, 5, 11
§ 1005(e)(2), 119 Stat. 2742 ..... 4, 5, 9, 11, 17
§ 1005(e)(2)(A), 119 Stat. 2742 4
§ 1005(e)(2)(C), 119 Stat. 2742 ..... 4, 13, 17, 30
§ 1005(e)(2)(C)(i), 119 Stat. 2742 ..... 13, 14
§ 1005(e)(2)(C)(ii),119 Stat. 2742 13
§ 1005(e)(3), 119 Stat. 2743 ..... 4, 5, 9
§ 1005(e)(3)(A), 119 Stat. 2743 4

Statutes—Continued: Page

§ 1005(h)(1), 119 Stat. 2743 11
§ 1005(h)(2), 119 Stat. 2743 5
Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 2
§ 3, 120 Stat. 2600 12
§ 3(a), 120 Stat. 2600 12
§ 3(a)(1), 120 Stat. 2600 (10 U.S.C. 948a *et seq.*):
120 Stat. 2603 (10 U.S.C. 948d(c)) 16
120 Stat. 2623 (10 U.S.C. 950j) 12
§ 7, 120 Stat. 2635 ..... 9, 11, 12
§ 7(a), 120 Stat. 2635 (28 U.S.C. 2241(e)) 5, 6, 9, 10, 11
120 Stat. 2636 (28 U.S.C. 2241(e)(1)) 5, 9, 10
120 Stat. 2636 (28 U.S.C. 2241(e)(2)) 5, 6, 9
§ 7(b), 120 Stat. 2636 ..... 6, 10, 11
28 U.S.C. 2241 ..... 3, 5, 11
28 U.S.C. 2254(b)(1) 15
28 U.S.C. 2254(e) 15

Miscellaneous:

3 William Blackstone, *Commentaries* 26
Robert Chambers, *A Course of Lectures on The English Law: Delivered at Oxford, 1767-1773* (Thomas M. Curley ed., 1986) 26
Dep't of Def., *Annual Administrative Review Boards for Enemy Combatants Held at Guantanamo Attributable to Senior Defense Officials* (Mar. 6, 2007) <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902> 18

In the Supreme Court of the United States

No. 06-1195

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v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 476 F.3d 981.[1] The opinions of the district courts are reported at 355 F. Supp. 2d 311 (Pet. App.

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix filed in No. 06-1195.

51a-79a) and 355 F. Supp. 2d 443 (06-1196 Pet. App. 61-127).

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2007. The petitions for a writ of certiorari were filed on March 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are aliens detained by the Department of Defense at the Naval Base at Guantanamo Bay, Cuba. Their detention is based on individualized determinations by military Combatant Status Review Tribunals (CSRTs) that they are enemy combatants in the ongoing armed conflict against the al Qaeda terrorist organization and its supporters. Under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, those determinations are subject to review in the United States Court of Appeals for the District of Columbia Circuit. Challenges to the scope of review provided by the DTA may also be presented to the D.C. Circuit. Petitioners, unlike other detainees at Guantanamo Bay, have not availed themselves of the review provided by the DTA. The court of appeals held that the district court lacked jurisdiction under the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, to consider their habeas challenges filed outside of the exclusive review procedure established by the DTA.

1. In *Rasul* v. *Bush*, 542 U.S. 466 (2004), this Court held that district courts had jurisdiction under 28 U.S.C. 2241 to consider habeas petitions filed by detainees at Guantanamo Bay. The D.C. Circuit had relied on *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), for the proposi-

tion that habeas jurisdiction does not extend to aliens held outside the sovereign territory of the United States. See *Al Odah* v. *United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003), rev'd *sub nom. Rasul* v. *Bush*, 542 U.S. 466 (2004). This Court reversed. The Court reasoned that, on the question of "statutory jurisdiction" under 28 U.S.C. 2241, *Eisentrager* had implicitly rested on the narrow construction of the habeas statute adopted in *Ahrens* v. *Clark*, 335 U.S. 188 (1948), which did not survive the Court's decision in *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973). See *Rasul*, 542 U.S. at 477-479. Accordingly, this Court had no occasion to revisit *Eisentrager*'s constitutional holding and instead concluded, as a statutory matter, that Section 2241 "confer[red] * * * jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base." *Id.* at 484. The Court emphasized that it had decided "only whether the federal courts have jurisdiction," and it expressly declined to address "the merits of petitioners' claims." *Id.* at 485.

2. After the remand in *Rasul*, numerous Guantanamo Bay detainees filed habeas petitions. Their actions include 13 cases, involving more than 60 detainees, which were coordinated in the district court for limited procedural purposes, but assigned to two different district judges. Respondents moved to dismiss the claims of each detainee. One district court, acting on eleven of the cases, granted the motions in part and denied them in part, concluding that Due Process Clause of the Fifth Amendment applies extraterritorially to aliens held at Guantanamo Bay, and that the CSRT procedures are constitutionally deficient. 06-1196 Pet. App. 61a-128a. Another district court, acting on two cases,

granted the motions to dismiss in full, holding that the petitioners' detention was authorized by the congressional Authorization for Use of Military Force (AUMF), Pub. L. 107-40, 115 Stat. 224, and that the Constitution does not protect aliens outside sovereign United States territory, including at Guantanamo Bay. Pet. App. 51a-79a. Both decisions were appealed.

3. Recognizing that litigation over habeas filings by other detainees was consuming enormous resources and disrupting the day-to-day operation of the Guantanamo Bay Naval Base, Congress enacted the DTA. Section 1005(e)(1) of that Act amended the federal habeas corpus statute to provide that "no court, justice, or judge shall have jurisdiction" to consider habeas petitions filed by aliens detained at Guantanamo Bay. DTA § 1005(e)(1), 119 Stat. 2742.

Section 1005(e)(2) of the Act provides that the Court of Appeals for the District of Columbia Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." DTA § 1005(e)(2)(A), 119 Stat. 2742. The DTA specifies that the court of appeals may determine whether a final CSRT decision "was consistent with the standards and procedures specified by the Secretary of Defense," and "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(C), 119 Stat. 2742. Section 1005(e)(3) creates a parallel exclusive-review mechanism for Guantanamo Bay detainees seeking to challenge final criminal convictions issued by military commissions. DTA § 1005(e)(3)(A), 119 Stat. 2743.

4. While these appeals were pending, this Court decided *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006). In *Hamdan*, the Court held that Section 1005(e)(1), the jurisdiction-removing provision of the DTA, does not apply to habeas claims filed before the DTA was enacted. See *id.* at 2762-2769. In reaching that conclusion, the Court observed that the statute made the exclusive-review provisions in Sections 1005(e)(2) and 1005(e)(3) of the DTA "expressly * * * applicable to pending cases." *Id.* at 2764 (citing DTA § 1005(h)(2), 119 Stat. 2743). The Court noted the absence of such language regarding Section 1005(e)(1), and therefore drew a "negative inference" as to Congress' intent to apply Section 1005(e)(1) to pending cases. *Id.* at 2766.

5. In the wake of this Court's decision in *Hamdan*, Congress enacted the MCA. Section 7(a) of the MCA amends 28 U.S.C. 2241 to provide that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." Section 7(a) also eliminates federal court jurisdiction, except as provided by Sections 1005(e)(2) and (3) of the DTA, over "any other action against the Untied States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of such an alien. MCA § 7(a), 120 Stat. 2636. The MCA further provides that these amendments "shall take effect on the date of the enactment of this Act," and that they "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act, which relate to any aspect of the detention, transfer, treatment, trial, or conditions of

detention of an alien detained by the United States since September 11, 2001." MCA § 7(b), 120 Stat. 2636.

6. On February 20, 2007, the court of appeals dismissed these cases for lack of jurisdiction.

a. The court held that the MCA applies to petitioners' pending habeas cases—each of which "relates to an 'aspect' of detention and * * * deals with the detention of an 'alien' after September 11, 2001," Pet. App. 6a—and thus eliminates federal court jurisdiction over their petitions, *id.* at 6a-9a. The court rejected petitioners' argument that Section 7(b)'s effective-date provision applies only to non-habeas detention-related cases specified in Section 7(a) (28 U.S.C. 2241(e)(2)). The court explained that Section 7(b) specifies the effective date of Section 7(a), which eliminates federal jurisdiction over *both* habeas and all other detention-related claims in "all cases, without exception." *Id.* at 9a.

The court of appeals further held that the MCA is consistent with the Suspension Clause, for two independent reasons. First, as aliens outside the sovereign territory of the United States, petitioners have no constitutional rights under that clause. Pet. App. 14a (citing, *e.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950)). Second, even if petitioners had constitutional rights under the Suspension Clause, the clause would not protect a right to the writ in these circumstances. As the court explained, "the Suspension Clause protects the writ 'as it existed in 1789,'" *id.* at 10a, but "the history of the writ in England prior to the founding" shows that "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." *Id.* at 12a-13a.

The court further explained that this Court's decision in *Eisentrager* "ends any doubt about the scope of com-

mon law habeas." Pet. App. 13a. In *Eisentrager*, this Court stated that it was aware of "no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Ibid.* (quoting *Eisentrager*, 339 U.S. at 768).

The court of appeals held that petitioners' reliance on this Court's decision in *Rasul* was misplaced. Pet. App. 13a. The court explained that *Rasul* interpreted only the statutory right to habeas, so it "could not possibly have affected the constitutional holding of *Eisentrager*," *id.* at 15a n.10, in which the Court explicitly held that aliens detained outside the sovereign territory of the United States do not have a constitutionally protected right to the writ, see 339 U.S. at 781.

Having concluded that the MCA eliminates jurisdiction in petitioners' cases, the court vacated the district courts' decisions and dismissed the cases for want of jurisdiction. Pet. App. 19a-20a.

b. Judge Rogers dissented. She agreed that Congress intended the MCA to withdraw federal jurisdiction over the detainees' claims, but she found the statute to be inconsistent with the Suspension Clause, because "Congress has neither provided an adequate alternative remedy * * * nor invoked the exception to the Clause by making the required findings to suspend the writ." Pet. App. 21a-22a.

ARGUMENT

The scope of judicial review afforded to aliens detained at Guantanamo Bay who have been determined to

be enemy combatants is important, but the issues raised by the petitions do not warrant this Court's review at this time. In the DTA, Congress has provided a means by which petitioners can obtain judicial review of the validity of their detention. Petitioners contend that this review mechanism is deficient in various respects, but their claims are not ripe because petitioners have not even attempted to pursue review under the DTA. An effort to seek DTA review would not only allow petitioners to challenge the scope of review available under the DTA but also give concrete guidance as to the extent of that review. There is no need for this Court to assess the adequacy of DTA review before it has taken place, and certainly none that warrants the extraordinary expedition requested by petitioners.

Furthermore, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The court's holding that the MCA eliminates jurisdiction over petitioners' habeas actions is compelled by the plain language of the statute. Relying on the settled precedent of this Court, the court of appeals also correctly held that the MCA does not violate the Suspension Clause. As aliens outside the sovereign territory of the United States, petitioners have no rights under the Suspension Clause, and, in any event, the habeas rights protected by that provision would not extend to aliens detained at Guantanamo Bay as enemy combatants.

Congress has afforded petitioners—all aliens detained at Guantanamo Bay as confirmed enemy combatants in the ongoing armed conflict against the al Qaida terrorist organization and its supporters—an unprecedented degree of access to our courts in wartime. No other captured enemy combatants in the history of this

country, or any other, have enjoyed such privileges. The court of appeals has correctly concluded that petitioners must exercise their statutory right of judicial review through the procedures established by Congress. Petitioners have failed to demonstrate a sufficiently compelling basis for this Court to review the court of appeals' decision before petitioners have even attempted to invoke the procedures that Congress has afforded. And, in any event, any review in this Court of the questions presented should await a case in which a detainee has actually invoked his right of judicial review under the DTA, and in which this Court may consider the judicial review available under the DTA on a developed and concrete record, rather than in the abstract.

1. The court of appeals correctly held that the MCA removes federal jurisdiction over petitioners' pending habeas petitions. Section 7 of the MCA unequivocally eliminates federal court jurisdiction over petitioners' claims, except as provided by Section 1005(e)(2) and (3) of the DTA. Section 7(a) of the MCA amends 28 U.S.C. 2241 to provide that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien" detained by the United States as an enemy combatant. In addition, Section 7(a) eliminates federal jurisdiction over "any other action * * * relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of such an alien. MCA § 7(a), 120 Stat. 2636. The statute further provides that both of these amendments "shall take effect on the date of the enactment of this Act," and that they "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act, which relate to any aspect of the detention, transfer, treatment, trial, or conditions of

detention of an alien detained by the United States since September 11, 2001." MCA § 7(b), 120 Stat. 2636.

As the court of appeals explained, "[t]he detainees' lawsuits fall within the subject matter covered by the amended [Section] 2241(e); each case relates to an 'aspect' of detention and each deals with the detention of an 'alien' after September 11, 2001. The MCA brings all such 'cases, without exception' within the new law." Pet. App. 6a. The court of appeals' conclusion that the MCA applies to these cases is unassailable and provides no basis for further review. Indeed, though Judge Rogers dissented on other issues, she agreed with the majority that "Congress intended to withdraw federal jurisdiction" through the MCA. *Id.* at 21a.

Petitioners contend (Pet. 13; 06-1196 Pet. 25-26) that Section 7(b)'s effective-date provision does not apply to the elimination of jurisdiction over habeas cases in Section 7(a) (28 U.S.C. 2241(e)(1)), and that jurisdiction over their pending habeas cases is therefore preserved. That claim is contrary to both the statutory language and the underlying legislative intent. The scope of Section 7(b) is unambiguous—it applies to the amendment "made by subsection (a)," MCA § 7(b), 120 Stat. 2636, which expressly includes the elimination of jurisdiction over habeas claims brought by aliens detained as enemy combatants. MCA § 7(a), 120 Stat. 2635. Thus, there is no basis for reading Section 7(b), which applies to "all cases, without exception * * * which relate to any aspect of the detention, transfer treatment, trial, or conditions of detention," to exclude the habeas cases addressed in Section 7(a). As the court of appeals explained, "[h]abeas cases are simply a subset of cases dealing with detention." Pet. App. 7a-8a; see *Preiser* v. *Rodriguez*, 411 U.S. 475, 484 (1973) ("the essence of ha-

beas corpus is an attack by a person in custody on the legality of that custody").

The court of appeals properly rejected petitioners' argument that the MCA does not satisfy the requirement that a statute contain a "clear statement" in order to "repeal habeas jurisdiction," *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001). Section 7(a) expressly refers to the elimination of "habeas" jurisdiction. It also amends the habeas statute, 28 U.S.C. 2241. And the effective-date provision of Section 7(b), stating that the amendment "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act," makes clear that the repeal of habeas jurisdiction applies to pending cases. Indeed, Congress "could not [have been] clearer." Pet. App. 7a. "It is almost as if the proponents of these words were slamming their fists on the table shouting 'When we say "all," we mean all—**without exception!**'" *Ibid.* This is more than sufficient to satisfy *St. Cyr*, which, as the court of appeals explained, "demands clarity, not redundancy." *Id.* at 8a.

The context in which the MCA was enacted underscores that Section 7 was intended to remove district-court jurisdiction over these cases and to do so clearly. In the DTA, Congress had attempted to accomplish that result and to place exclusive jurisdiction in the D.C. Circuit. See DTA § 1005(e)(1) and (2), (h)(1), 119 Stat. 2742, 2743. This Court, however, held that the DTA failed to make sufficiently clear that the elimination of district-court jurisdiction applied to pending cases. See *Hamdan*, 126 S. Ct. at 2769. Congress reacted swiftly to *Hamdan* by extending the elimination of habeas jurisdiction to "all cases, without exception, pending" on the date of the MCA's enactment. MCA § 7(b), 120 Stat. 2636. Indeed, as the court of appeals explained,

"[e]veryone who has followed the interaction between Congress and the Supreme Court knows full well" that the MCA was passed in response to *Hamdan*. Pet. App. 6a; see *id.* at 6a n.2 (discussing legislative history).[2]

2. As explained below, aliens held outside the sovereign territory of the United States do not enjoy the protections of the Suspension Clause. In any event, even in contexts to which the Suspension Clause is fully applicable, this Court has held that Congress may withdraw habeas jurisdiction if it provides an adequate alternative remedy. See *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977); *St. Cyr*, 533 U.S. at 314 n.38. Here, the DTA and the MCA satisfy that requirement by giving petitioners the right to obtain judicial review of the military's determination that they are properly classified as enemy combatants. At the very least, the availability of judicial review through the DTA underscores that consideration of petitioners' claims would be premature because they have not yet exhausted their remedies under the DTA. Pursuing that avenue would afford this Court the oppor-

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[2] Petitioners suggest (Pet. 13 n.10; 06-1196 Pet. 25-26) that Section 3(a) of the MCA compels a negative inference that Section 7(b) does not repeal jurisdiction over pending habeas cases. That argument lacks merit. Section 3(a)(1) enacts 10 U.S.C. 950j, which removes federal jurisdiction to review final military-commission decisions, except as otherwise provided in the statute. As the court of appeals explained, "Section 7(b), read in conjunction with [S]ection 7(a), is no less explicit than § 950j." Pet. App. 9a. Indeed, Congress used very similar language in Sections 3 and 7. Both sections refer explicitly to the habeas statute. And Section 7, referring to "all cases, without exception," is even broader than Section 3, referring to "any claim or cause of action." In contrast to the statutory provisions addressed in *Hamdan*, therefore, there is no basis for drawing a "negative inference" from Section 3 that Congress did not intend Section 7 to repeal habeas jurisdiction.

tunity to assess the adequacy of the DTA's alternative in a concrete context, rather than in the abstract. It also would show proper regard to Congress's considered judgment that that alternative is appropriate for alien military detainees in the current conflict.

a. Section 1005(e)(2)(C) of the DTA specifies the D.C. Circuit's "[s]cope of review" of the CSRT's enemy-combatant determination. The court must consider "whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence)." DTA § 1005(e)(2)(C)(i), 119 Stat. 2742. The court also must consider, "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." *Id.* § 1005(e)(2)(C)(ii), 119 Stat. 2742. Thus, the statute allows for ample judicial review both of the procedures used by the CSRTs and of the evidentiary sufficiency of their determinations.

All but one of the petitioners (who has been charged with a military-commission offense) are being detained for non-punitive reasons during the ongoing conflict. See *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 518-524 (2004) (plurality opinion). The level of review afforded under the DTA, however, gives petitioners greater rights of judicial review than traditionally provided to those held for punishment pursuant to the judgment of a military tribunal. This Court has held that the habeas review afforded in that context does not examine the guilt or

innocence of the defendant, nor does it examine the sufficiency of the evidence. Rather, it is limited to the question whether the military tribunal had jurisdiction. See *In re Yamashita*, 327 U.S. 1, 8 (1946); *Ex parte Quirin*, 317 U.S. 1, 25 (1942); see also *Eisentrager*, 339 U.S. at 786; *id.* at 797 (Black, J. dissenting) (extent of review "is of most limited scope"); cf. *Hamdi*, 542 U.S. at 535 (plurality opinion) (recognizing that "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting").

Under *Yamashita*, there was review only of the threshold jurisdictional question whether the offense and offender were triable by military commission. There was no review of other legal questions, compliance with the military's own procedures, or evidentiary sufficiency—all of which the DTA and MCA permit. See DTA § 1005(e)(2)(C)(i), 119 Stat. 2742. Thus, the review provided by Congress in the DTA far surpasses the type of review available under *Yamashita*—a level of review deemed adequate for an alien enemy convicted by a military commission and sentenced to death—and it affords an adequate and effective substitute remedy for any applicable habeas right. See *Pressley*, 430 U.S. at 381.

The review provided under the DTA is not only greater than that afforded under *Yamashita*, it also is fully consistent with traditional habeas practice even outside the particularly deferential military context. This Court has explained that under traditional habeas review, "pure questions of law" are generally reviewable, but, "other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive." *St. Cyr*, 533 U.S. at 305-306 (footnote

omitted); cf. *Herrera* v. *Collins*, 506 U.S. 390, 400 (1993) ("[H]abeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."); 28 U.S.C. 2254(e). DTA review fully satisfies even that standard for conventional habeas petitions (putting aside the extraordinary nature of the petitions here). Thus, even if precedent developed in the non-military context were to be applied, petitioners' Suspension Clause arguments would fail because Congress has provided an adequate alternative remedy.

b. The settled rule is that federal courts will decline to consider a habeas petition in circumstances where other judicial or administrative remedies have not been exhausted. See *Rose* v. *Lundy*, 455 U.S. 509, 515-516 (1982). This requirement is most commonly applied in cases where the available remedies are in state-court proceedings, see 28 U.S.C. 2254(b)(1), but it also applies to federal proceedings, see, *e.g.*, *United States* v. *Hayman*, 342 U.S. 205, 223 (1952), including those conducted by military tribunals, see *Clinton* v. *Goldsmith*, 526 U.S. 529, 537 n.11 (1999); *Noyd* v. *Bond*, 395 U.S. 683, 693-699 (1969); cf. *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975). The comity considerations that underlie the exhaustion requirement are especially pressing here, given that petitioners seek to challenge the concurrent judgment of Congress and the President regarding the conduct of an ongoing war. See *Hamdi*, 542 U.S. at 531 (plurality opinion); *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in the judgment) ("[T]here is a realm of political authority over military affairs where the judicial power may not enter.").

To be sure, in *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006), this Court declined to require exhaustion of the military-commission process before considering a chal-

lenge to the system of military commissions unilaterally established by the President. The Court emphasized that, while courts ordinarily "should respect the balance that Congress struck," *id.* at 2770, the military commissions were not established by Congress and did not provide for "independent review," *id.* at 2771. The contrast between this case and *Hamdan*, however, is striking. Congress enacted the statute at issue here in direct response to *Hamdan*. Moreover, the DTA and the MCA expressly recognize and affirm the CSRT process. See DTA § 1005, 119 Stat. 2740; MCA § 3(a)(1), 120 Stat. 2603 (to be codified at 10 U.S.C. 948d(c)). Under the DTA and the MCA, petitioners will enjoy "independent review" of the CSRT determinations in the D.C. Circuit. This Court should now "respect the balance that Congress struck" and allow that review process to run its course under the traditional rule that a habeas petitioner must first exhaust his remedies before challenging the scope of review.[3]

c. Exhaustion is also appropriate because it could resolve many of petitioners' specific objections to the DTA process, and at a minimum it would allow this Court to consider those objections in a more concrete setting. Petitioners complain (Pet. 18-21) about various aspects of the CSRT procedural rules. These objections lack merit, because the CSRTs provide detainees with

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[3] That is particularly true given that the *Al Odah* petitioners represented to the Court in *Rasul* that they sought only a military tribunal process to determine the validity of their detention, and "have never sought to have Article III courts make *any* individualized determinations of petitioners' alleged status as enemies or to second-guess military determinations as to which aliens pose a threat to the United States." Al Odah Reply Br. at 13, *Rasul*, *supra* (No. 03-334); see Tr. of Oral Arg. 9-10, 15, 18-19, *Rasul*, *supra* (No. 03-334).

procedural protections exceeding even those that this Court in *Hamdi* held would be sufficient for American citizens held in the United States. See 542 U.S. at 533 (plurality opinion). More to the point, petitioners' objections can be asserted in the D.C. Circuit under the DTA. That court can determine the nature of petitioners' rights, if any, under "laws of the United States" and the U.S. Constitution, and can decide whether the CSRT process violated any applicable rights. See DTA § 1005(e)(2), 119 Stat. 2742. Likewise, any claim that the CSRT misapplied the applicable standards and procedures is subject to review in the D.C. Circuit under the DTA. See DTA § 1005(e)(2)(C), 119 Stat. 2742. Petitioners therefore will have adequate opportunity to raise such grievances in their petitions for review in that court.

Petitioners assert that the review afforded under the DTA is insufficient because it does not authorize fact-finding by the court of appeals, and it prohibits them from submitting new exculpatory material. In fact, the DTA contains a provision requiring that such new evidence be considered by the Department of Defense. DTA § 1005(a)(3), 119 Stat. 2741 (directing the Secretary to "provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee"). In accordance with that requirement, the Defense Department will administratively review new evidence that a petitioner submits to determine whether it warrants reconsideration of the CSRT's enemy combatant determination.[4] Thus, con-

[4] In addition to the CSRT review process, the Department of Defense also conducts an annual administrative examination of whether it is appropriate to release or repatriate an enemy combatant. The 328 administrative reviews conducted in 2006 resulted in determinations

trary to petitioners' assertion, there is an administrative mechanism for these detainees to submit new evidence that may bear on their detention.

In any event, limiting the D.C. Circuit's DTA review to the CSRT record does not make the DTA a constitutionally inadequate substitute for habeas review. As noted above, in the context of the decisions of military tribunals, this Court has repeatedly held that habeas does not provide for factual review, and certainly does not provide an opportunity for counsel to build a new evidentiary record. *Yamashita*, 327 U.S. at 8, 17; *Quirin*, 317 U.S. at 25. Even outside the military context, there is no right to factual re-examination of a judgment. See, *e.g.*, *Felker* v. *Turpin*, 518 U.S. 651, 663-664 (1996) (restrictions on successive petitions do not violate Suspension Clause). Likewise, for the confirmed alien enemy combatants here, there is no constitutional right to successive CSRT decisions.

Moreover, it is not yet established how, in practice, DTA review will be conducted. Those detainees who have pursued their DTA remedies have argued strenuously for an exhaustive scope of review, including wide-ranging discovery and fact-finding by the court of appeals—a level of review far exceeding that traditionally available in habeas. See, *e.g.*, Emer. Mot. for Order Setting Procedures at 9-10, *Parhat* v. *Gates*, No. 06-1397 (D.C. Cir. filed Dec. 22, 2006) (petitioners "are entitled

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that 55 detainees (roughly 17 percent) should no longer be detained at Guantanamo Bay. See Department of Defense, *Annual Administrative Review Boards for Enemy Combatants Held at Guantanamo Attributable to Senior Defense Officials* (Mar. 6, 2007) <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902>. Since 2002, approximately 390 detainees have been transferred or released. See *ibid.*

to a hearing and limited discovery" of "all evidence relevant to petitioners' enemy combatant determination"); Mot. to Compel at 19, *Bismullah* v. *Gates*, No. 06-1197 (D.C. Cir. filed Aug. 7, 2006) (arguing that the "DTA must be construed to permit Bismullah to adduce new evidence in support of his claim that he is not and never has been an 'enemy combatant'"). The government has opposed those arguments, but the D.C. Circuit has not yet resolved them.[5] Conventional principles against avoiding important constitutional questions before it is necessary to decide them counsel strongly against jumping to determine, at this early juncture, the adequacy of DTA review before the D.C. Circuit has even had an opportunity to determine what that review entails in a concrete setting and issued a decision adverse to an enemy combatant.[6]

3. The court of appeals correctly held that petitioners do not enjoy rights under the Suspension Clause.

a. As the court of appeals recognized, this Court's precedent—including the constitutional holding of *Eisentrager*—"holds that the Constitution does not confer rights on aliens without property or presence within

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[5] The D.C. Circuit has ordered expedited briefing and argument in *Parhat* and *Bismullah* to consider the nature of review under the DTA and issues relating to the entry of a proposed protective order addressing, among other things, counsel access to classified information. Oral argument will be held on May 15.

[6] Petitioners further contend (Pet. 20) that the DTA does not expressly authorize the court of appeals to order a detainee's release. In fact, all of the detainees who were determined by CSRTs not to be enemy combatants have been released from United States custody. See Notice of Transfer at 3, *Kiyemba* v. *Bush*, No. 05-5487 (D.C. Cir. filed Nov. 21, 2006). And, in any event, petitioners may direct to the D.C. Circuit any arguments about the appropriate relief under the DTA in the case (if any) in which such a detainee is not released.

the United States." Pet. App. 14a. As to any alleged rights under the Suspension Clause in particular, this Court's decision in *Eisentrager* is "controlling." *Ibid.*

In *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), this Court held that aliens detained as enemies outside the United States are not "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*." *Id.* at 777. The Court concluded that, because the petitioner in that case had no constitutional rights, the denial of habeas review did not violate either the Suspension Clause or the Fifth Amendment. *Id.* at 777-779, 784-785. In rejecting the assertion of a constitutional habeas right, the Court emphatically stated that such an entitlement "would hamper the war effort." *Id.* at 779. The Court explained that "[i]t would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Ibid.*

This Court has repeatedly reaffirmed *Eisentrager*'s holding that aliens outside the United States have no rights under the Constitution. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) ("Not only are history and case law against [the alien], but as pointed out in [*Eisentrager*], the result of accepting his claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries."); *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) (citing *Eisentrager* and *Verdugo-Urquidez* for the proposition that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders").

Likewise, the courts of appeals have consistently applied these precedents in various contexts. See, *e.g.*, *People's Mojahedin Org. of Iran* v. *Department of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause *or otherwise*") (emphasis added), cert. denied, 529 U.S. 1104 (2000). With respect to Guantanamo Bay specifically, the Eleventh Circuit has held that aliens there "have no First Amendment or Fifth Amendment rights." *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1428, cert. denied, 515 U.S. 1142 and 516 U.S. 913 (1995); see also *id.* at 1425 ("We disagree that 'control and jurisdiction' is equivalent to sovereignty.").[7]

Petitioners contend (Pet. 17; 06-1196 Pet. 14-15) that *Eisentrager* is no longer good law in the wake of this Court's decision in *Rasul*. Petitioners misread *Rasul*. *Rasul* held that the "statutory predicate" for the Court's holding in *Eisentrager* had been overruled, and it therefore rejected the D.C. Circuit's broad holding, based on *Eisentrager*, that habeas jurisdiction was entirely unavailable to aliens at Guantanamo Bay. See *Rasul*, 542 U.S. at 475, 479. It did not, however, cast any doubt on *Eisentrager*'s holding—or the holdings of subsequent cases relying on *Eisentrager*—that aliens held abroad do not have a *constitutionally* guaranteed right to habeas corpus. See *id.* at 478. *Rasul* addressed only the extent to which the habeas *statute* applies

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[7] Petitioners argue (Pet. 17-18) that it does not matter whether they enjoy constitutional rights, because the Suspension Clause is "a limitation on congressional power." But so too is the Fifth Amendment. In any event, however the Suspension Clause is described, *Eisentrager* establishes that it does not apply to aliens held outside sovereign United States territory. Cf. Pet. App. 17a-19a.

extraterritorially, and it expressly reserved all constitutional questions. See *id.* at 485. Nothing in *Rasul* suggests that the Court implicitly overruled *Eisentrager* or the many other precedents governing that question.

Petitioners' reliance on a concurrence in *Rasul* (Pet. 17; 06-1196 Pet. 20) is likewise misplaced. Justice Kennedy stated that the detainees at Guantanamo Bay are distinguishable from the petitioner in *Eisentrager* in two ways, from which he would have concluded that there was jurisdiction under the federal habeas statute. *Rasul*, 542 U.S. at 487-488 (Kennedy, J., concurring in the judgment). First, he stated, "Guantanamo Bay is in every practical respect a United States territory." *Id.* at 487. Second, "the detainees at Guantanamo Bay are being held indefinitely, and without benefit of *any legal proceeding to determine their status.*" *Id.* at 487-488 (emphasis added). The latter observation cannot extend to this case. Since this Court's decision in *Rasul*, all of petitioners have had CSRTs, which have issued individualized decisions determining that each is properly being detained as an enemy combatant. Further, Congress has not only recognized the CSRT process but provided for review of those CSRT determinations in the D.C. Circuit. Thus, there is an established statutory mechanism for the detainees to challenge their status determination.

The other "critical" fact Justice Kennedy cited—that, in construing the habeas statute, Guantanamo Bay should be treated as sovereign territory of the United States—was rejected by the majority in *Rasul*, which held that the United States exercises control, but "not 'ultimate sovereignty,'" over the leased area. See 542 U.S. at 475. And although the Court concluded that such control was sufficient to establish *statutory* habeas

jurisdiction even as to aliens, it focused on the distinctive language of the habeas statute, see *id.* at 481, as well as the "'extraordinary territorial ambit' of the writ at common law," *id.* at 482 n.12 (citation omitted). Indeed, the very fact that the Court was addressing the territorial reach of the writ underscores that Guantanamo Bay—a part of the sovereign territory of Cuba—lies *outside* the sovereign territory of the United States.

In any event, the status of Guantanamo Bay for purposes of the habeas statute is no longer a relevant consideration. The DTA makes clear that detainees at Guantanamo Bay have an avenue to challenge their detention in the court of appeals and that that new statutory remedy is exclusive. Accordingly, the question now before the Court is the constitutionality of this new statute. As to that question, *Eisentrager* controls: petitioners, as aliens outside the United States, are not "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas*." 339 U.S. at 777.

Petitioners nevertheless contend that, even though they are aliens held on Cuban sovereign territory, they should be treated as being within the United States since the United States has control over the Naval Base at Guantanamo Bay. What was critical to the constitutional holding in *Eisentrager*, however, was sovereignty, not control. In *Eisentrager*, the petitioners were aliens imprisoned at a United States military base in Germany, which was controlled by the United States Army. See 339 U.S. at 766. Despite that control, this Court stressed that the aliens "at no relevant time were within any territory over which the United States is *sovereign*," *id.* at 778 (emphasis added), and, on that basis, it held that application of the Fifth Amendment would be

impermissibly "extraterritorial" (*id.* at 784). The United States is not sovereign over Guantanamo Bay; it operates a naval base there under written agreements with Cuba that expressly recognize Cuban sovereignty.[8]

Even if Guantanamo Bay were somehow treated as sovereign United States territory (contrary to *Rasul*), petitioners still would not have any constitutional rights. In *Verdugo-Urquidez*, this Court held that aliens "receive constitutional protections when they have come within the territory of the United States *and* developed *substantial* connections with this country." 494 U.S. at 271 (emphases added); see *People's Mojahedin*, 182 F.3d at 22. The Court further held that "lawful but involuntary" presence in the United States "is not of the sort to indicate any substantial connection with our country" for constitutional purposes. *Verdugo-Urquidez*, 494 U.S. at 271. Applying that rule, this Court denied Fourth Amendment protection to an alien who was being detained *in the United States* against his will, but who had "no previous significant *voluntary* connection with the United States." *Ibid.* (emphasis added). Similarly, here, petitioners' presence at Guantanamo Bay is, as the

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[8] See Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 (Lease); Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, T.S. No. 426 (Supp. Lease); Treaty on Relations with Cuba, May 29, 1934, U.S.-Cuba, 48 Stat. 1682. Under those agreements, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba" over the leased area, and "Cuba consents" to United States control over that area, but only "during the period" of the lease. Lease art. III. The lease permits the United States to "do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose." Lease art. II. The United States may not, for example, allow civilian settlement at Guantanamo Bay, or establish "commercial" or "industrial" enterprises there. Supp. Lease art. III.

petitions underscore, involuntary, and the detainees lack significant voluntary connections with this country.[9]

b. Even if alien enemy combatants detained outside the United States do possess some measure of constitutional rights, the court of appeals correctly held that the protections of the Suspension Clause do not extend "to aliens held at an overseas military base leased from a foreign government." Pet. App. 14a.

As the court of appeals explained, the Suspension Clause protects the common law writ of habeas corpus, "as it existed in 1789." Pet. App. 10a (quoting *St. Cyr*, 533 U.S. at 301). The court further noted that petitioners were unable to identify any cases "showing that the English common law writ of habeas corpus extended to aliens beyond the Crown's dominions." Pet. App. 11a. And the court, in undertaking its own review, found the contrary: "[e]very territory * * * cited as a jurisdiction to which the writ extended * * * was a sovereign territory of the Crown," but when "the Crown detained prisoners outside the Crown's dominions, it was understood that they were outside the jurisdiction of the writ." *Id.* at 12a. As the court stated, "[t]he short of the matter is that given the history of the writ in England prior to the founding, habeas corpus would not have been available in 1789 to aliens without presence or property within the United States." *Id.* at 12a-13a.

The court's conclusion is correct. Numerous contemporary treatises support its understanding of the scope

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[9] Even if Guantanamo Bay were treated as sovereign United States territory, and even if petitioners had a substantial connection to the United States, petitioners would face an additional barrier to their assertion of constitutional rights: their failure to effect an "entry" into the United States. See *Zadvydas*, 533 U.S. at 693; *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 215 (1953).

of the writ at common law. See Pet. App. 11a (citing, *inter alia*, 3 William Blackstone, *Commentaries* *131; 2 Robert Chambers, *A Course of Lectures on the English Law: Delivered at Oxford, 1767-1773*, at 7-8 (Thomas M. Curley ed., 1986)). Moreover, no cases to the contrary have been identified. The cases upon which petitioners rely are inapposite, as the court of appeals explained, Pet. App. 10a-11a, because they all involved petitions by aliens held *within* sovereign territory.[10] Nor do the cases cited by the dissent (*id.* at 33a-36a) cast any doubt on the court of appeals' holding.[11]

In any event, as the court of appeals further explained, this Court's decision in *Eisentrager* "ends any doubt about the scope of common law habeas." Pet. App. 13a. In *Eisentrager*, this Court observed that no court has ever issued a writ on behalf of an alien enemy that was not within the court's jurisdiction at any time

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[10] See *Lockington's Case*, Brightly 269 (Pa. 1813) (denying habeas petition of enemy alien found in Philadelphia); *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779) (declining to review detention of sailors held within English sovereign territory because they were "alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus"); *Rex* v. *Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (denying habeas to Swedish citizen held in Liverpool because there was ample evidence that he was a prisoner of war).

[11] See *Rex* v. *Cowle*, 97 Eng. Rep. 587, 599 (K.B. 1759) (holding King's Bench had power to issue writ to Berwick, an English borough, after determining that Berwick was part of sovereign English territory); *Rex* v. *Mitter*, 1 Indian Dec. 1008 (Calcutta S.C. 1781) (local court in India, specifically authorized by the British Parliament pursuant to the East India Company Regulation Act of 1773, held that it lacked power to issue writ); *Rex* v. *Hastings*, 1 Indian Dec. 1005 (Calcutta S.C. 1775) (same).

during his captivity. See 339 U.S. at 768. Petitioners provide no reason for revisiting that conclusion here.

Petitioners contend (Pet. 15-16; 06-1196 Pet. 18) that the court of appeals' reliance on *Eisentrager* ignored this Court's more recent decision in *Rasul*. That is incorrect. *Rasul* was limited to a construction of the federal habeas statute; it studiously avoided addressing the constitutional right to habeas. See pp. 21-22, *supra*.

Insofar as the Court discussed common-law habeas rights in *Rasul*, it did not conclude that habeas jurisdiction would have extended to aliens outside the sovereign territory of England. Instead, it stated that, "[a]t common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control." 542 U.S. at 481-482 (footnotes omitted). The cited cases involving "persons" outside the "sovereign territory of the realm" all involved *British subjects*. See *id.* at 481-482 nn.12-13. In stating that "[a]pplication of the habeas statute to *persons* detained at the base is consistent with the historical reach of the writ," *id.* at 481 (emphasis added), the Court thus rested not on the historic availability of habeas to aliens abroad, but on its historic availability to *citizens* abroad in controlled territories, combined with the fact that the habeas "statute draws no distinction between Americans and aliens." See *id.* at 481-82. The DTA, of course, draws just such a distinction, and so aliens outside the realm to whom the writ was historically *unavailable* have no basis to piggyback on the availability of the writ to citizens outside the realm. For that reason, *Rasul* in

no way undermines *Eisentrager*'s holding as to the scope of the writ protected by the Suspension Clause.[12]

4. Finally, petitioners raise various objections to the merits of their detention. Those arguments have not been considered by the court of appeals, so they do not provide a basis for review here. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984). They should instead be presented to the D.C. Circuit in the context of DTA review of petitioners' CSRT determinations. If petitioners are dissatisfied with the outcome of the proceedings in the D.C. Circuit, they may seek further review in this Court at that time.

In any event, petitioners' objections lack merit. Petitioners contend (Pet. 25) that the definition of "enemy combatant" as applied to them is inconsistent with the AUMF and Executive authority. That is incorrect. The AUMF authorizes the President to take action against all "organizations" that "planned, authorized, committed, or aided" the September 11 attacks. 115 Stat. 224. Al Qaida is undeniably such an organization, and the CSRTs determined that petitioners were "part of or supporting * * * al Qaida forces or associated forces that are engaged in hostilities against the United States." Pet. App. 81a. Petitioners' claim that *Hamdi* limits the Executive's authority under the AUMF is without basis. In *Hamdi*, the plurality looked to the text of the AUMF and traditional laws of war in upholding

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[12] Petitioners assert that the Suspension Clause may extend beyond the writ "as it existed in 1789." Pet. 14 (citing *St. Cyr*, 533 U.S. at 301). Whatever the merits of "[a]n evolving interpretation of the Suspension Clause"; Pet. 15 n.12, that issue is not presented in this case. Petitioners cannot show any historical practice, either before or after 1789, of extending habeas corpus to alien enemies detained outside of sovereign territory.

the President's authority to detain individuals who were "part of or supporting forces hostile to the United States" and who had themselves "engaged in an armed conflict against the United States." 542 U.S. at 516-521; see also *id.* at 586-588 (Thomas, J., dissenting). Nothing in *Hamdi* even remotely suggests, however, that the AUMF encompasses *only* those individuals.

The suggestion (Pet. 28), that petitioners are being improperly detained because they are akin to "little old lad[ies] in Switzerland" who unwittingly lend financial support to al Qaida activities, is absurd. After individualized hearings, petitioners were each found to be enemy combatants based on their substantial connections with, or provision of support to, al Qaida or associated forces—a terrorist network that has already inflicted the deadliest foreign attack ever on American soil and has repeatedly vowed to strike America and its allies again. The records of those CSRT proceedings contain ample evidence supporting those findings.[13]

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[13] While classified information reinforces many of the CSRT determinations and cannot be addressed in a public filing, the unclassified summaries and other unclassified material in the record provide a much different perspective on these enemy combatants than suggested by the petitions. The lead habeas petitioners in the various cases for which petitions have been filed who remain in detention are indicative: Al Odah went to Afghanistan shortly before September 11, used an AK-47 at a training camp, and carried a weapon through the Tora Bora mountains during the US campaign in the region. Unclassified CSRT Decision Report (Al Odah), encl. 1, at 1. (The CSRT Decision Reports were included in the factual returns to the habeas petitions and are part of the district court record.) Boumediene traveled to conflict hotspots throughout the 1990s and provided assistance on several occasions to a known al Qaida operative. Unclassified CSRT Decision Report (Boumediene), encl. 1, at 1; *id.* exh. R1. David Hicks trained with al Qaida, collected intelligence on the U.S. Embassy in Afghanistan, and fought on the front lines against the United States in Afghanistan.

Petitioners are free to challenge those enemy-combatant determinations. And under the DTA, the D.C. Circuit can review the record evidence to ensure that the CSRTs properly adhered to the applicable standards and procedures and that their determinations are supported by a preponderance of the evidence. See DTA § 1005(e)(2)(C), 119 Stat. 2742. At a minimum, any consideration by this Court of the questions presented by this case should await the outcome of such proceedings.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Unclassified CSRT Decision Report (Hicks), encl. 1, at 1. Falen Gherebi was an al Qaida operative in Kabul who fled Afghanistan in November 2001; his name was also on a list of individuals who trained at an al Qaida camp. Unclassified CSRT Decision Report (Gherebi), encl. 1, at 1; *id.* exh. R1. Zohair Al-Shorabi went to Afghanistan for weapons training and fought on the front lines. CSRT Decision Report, encl. 1, at 1. Jamil El-Banna met with and aided an al Qaida operative, Abu Qatada, while he was in hiding from British police. *Al Odah* C.A. Supp. J.A. 1806. Ali Abdullah Almurbati voluntarily traveled from Bahrain to Afghanistan in November 2001 to get training and "fight the Jihad." Unclassified CSRT Decision Report (Almurbati), encl. 1, at 1.

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No. 06-1196

In the Supreme Court of the United States

KHALED A. F. AL ODAH, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The government argues that the issues raised in this Petition for Certiorari are not "ripe" because petitioners "have not yet exhausted their remedies under the DTA." Brief for the Respondents in Opposition ("Gov. Opp.") at 12. But the government's response demonstrates, in fact, that the key issues raised are ripe for determination by this Court, and that they should be decided now.

A habeas petitioner has no obligation to exhaust a remedy that is not adequate to vindicate the asserted right. *See, e.g., Wilwording v. Swenson*, 404 U.S. 249, 250 (1971).[1] As Judge Rogers made clear in her dissent below, the review provisions of the DTA, at least as they are interpreted by the D.C. Circuit, are plainly not adequate to vindicate petitioners' asserted habeas rights.

Section 1005(e)(2)(C)(i) of the DTA allows the D.C. Circuit to review a CSRT decision to determine whether it "was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs]" – in other words, whether the CSRTs followed their own procedures in reaching their determinations. Under that section, the court would be precluded from going behind the CSRTs to determine whether the definitions they used were legally sufficient and whether the procedures they followed were fair, adequate, and legitimate. That, however, is a fundamental requirement of habeas. As Justice Holmes famously wrote:

> [H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been pre-

[1] As explained in petitioners' Reply in support of their Motion to Expedite, there is serious doubt whether DTA review is even available to petitioners. *See* Reply to Respondents' Opposition to Motion to Expedite at 1 n.1.

> served, opens the inquiry whether they have been more than an empty shell.[2]

Any review process – such as the one set forth in Section 1005(e)(2)(C)(i) of the DTA – that limits the court to determining whether the jailor has followed its own rules, and precludes an inquiry into whether the rules themselves are adequate and more than an empty shell, cannot be an adequate or effective substitute for habeas.[3]

The DTA does provide a method for determining whether the standards and procedures followed by the CSRTs were adequate. Section 1005(e)(2)(C)(ii) (emphasis added) allows the D.C. Circuit to consider, "*to the extent the Constitution and laws of the United States are applicable*, whether the use of such standards and procedures to make

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[2] *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). Justice Holmes' dissenting opinion was later made the law of the land in *Moore v. Dempsey*, 261 U.S. 86 (1923). *See Fay v. Noia*, 372 U.S. 391, 411 n.22 (1963). His words frequently have been quoted with approval. *See, e.g., Harris v. Nelson*, 394 U.S. 286, 291 n.2 (1969); *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 807 (D.C. Cir. 1988) (en banc).

[3] Citing a number of cases reviewing convictions after trial by military tribunals, the government argues that "in the context of the decisions of military tribunals, this Court has repeatedly held that habeas does not provide for factual review . . . ." Gov. Opp. at 18. That may be so where the underlying process being reviewed allows for adequate factual development. Habeas, however, always enables the court to determine whether or not the underlying process being reviewed is fair, adequate, and legitimate and allows for adequate factual development. Any process that does not cannot be an adequate substitute for habeas, and habeas cannot be replaced and the courts restricted in their review of the legality of the detention by a process that is so inadequate. As Judges Green and Rogers concluded, and as pointed out in the Petition for Certiorari, the CSRTs were completely inadequate to test the legality of the detention. Pet. at 7-8, 12 n.24.

the determination is consistent with the Constitution and laws of the United States." The government, of course, has argued strenuously that the Constitution and laws of the United States are not applicable to these detainees because they are aliens held at Guantanamo. Gov. Opp. 19-25. It says, however, that review by this Court is premature because "the D.C. Circuit . . . can determine the nature of petitioners' rights, if any, under the 'laws of the United States' and the U.S. Constitution, and can decide whether the CSRT process violated any applicable rights." Gov. Opp. at 17. But the D.C. Circuit has already decided that issue. Based on *Johnson v. Eisentrager*, the D.C. Circuit held that petitioners have no constitutional rights and therefore are not entitled to constitutional review of the adequacy of the CSRT procedures. App. 15-17, 52-53.

The issue is therefore ripe for decision by this Court. It must be decided by this Court in order to determine the scope of review available under the DTA, as well as whether the government is correct in asserting that these petitioners have no constitutional protections whatsoever, including protections under the Suspension Clause of the Constitution. Those issues have been decided, albeit wrongly, by the D.C. Circuit. There are no remedies left for the petitioners to exhaust. These issues should be decided by this Court now so that these petitioners, imprisoned without a fair hearing for more than five years, are not forced to endure months and years more deprived of justice because of judicial delay.

CONCLUSION

The Court should grant the petition for a writ of *certiorari* to the Court of Appeals.

Respectfully submitted,

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No. 06-____

In the Supreme Court of the United States

KHALED A. F. AL ODAH, *ET AL.*,

Petitioners.

v.

UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FORMER FEDERAL JUDGES, DIPLOMATS, MILITARY OFFICERS, GOVERNMENT OFFICIALS, BAR LEADERS, POWs AND KAREN KOREMATSU-HAIGH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERESTS OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. This Court Has A Long Tradition Of Reviewing Executive Detention Pursuant To The Writ Of Habeas Corpus, Even In Times Of National Crisis 5

II. Federal Courts Have Jurisdiction To Adjudicate Petitions For Writs Of Habeas Corpus By Guantanamo Detainees 9

A. This Court has already decided that the common law writ of habeas corpus covers the Guantanamo Detainees 9

B. The DTA and MCA do not validly bar access to the constitutionally guaranteed common law writ of habeas corpus 11

C. The court of appeals majority opinion is inconsistent with *Rasul* and not mandated by *Eisentrager* 14

D. The writ of habeas corpus carries the promise of prompt, substantive review, which the decision below frustrates 15

CONCLUSION 20

APPENDIX: *Amici* Information 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Bollman, Ex parte
8 U.S. 75 (1807) 19

Boumediene v. *Bush*,
__ F.3d __, 2007 WL 506581,
(D.C. Cir. Feb. 20, 2007) ..... *passim*

Endo, Ex parte
323 U.S. 283 (1944) 8-9

Felker v. *Turpin*,
518 U.S. 651 (1996) 10

INS v. *St. Cyr*,
533 U.S. 289 (2001) 5, 10, 20

Johnson v. *Eisentrager*,
339 U.S. 763 (1950) 14-15

King v. *Cowle*,
2 Burr. 834, 97 Eng. Rep. 587 (K.B.) 10

Korematsu v. *United States*,
323 U.S. 214 (1944) 8

Merryman, Ex Parte
17 F. Cas. 144 (1861) 3

Milligan, Ex parte
71 U.S. 2 (1866) 6-7, 8, 17, 18

Mwenya, Ex parte
[1960] 1 Q.B. 241 (C.A.) 10

Quirin, Ex parte
317 U.S. 1 (1942) 8, 17, 18

Rasul v. *Bush*,
542 U.S. 466 (2004) ..... *passim*

Reid v. *Covert*,
354 U.S. 1 (1957) 18

TABLE OF AUTHORITIES—continued

Page(s)

Yamashita, In re
327 U.S. 1 (1946) 8, 17, 18

STATUTES, RULES AND REGULATIONS

U.S. CONST. art. I, § 9 ..... 6, 9, 12

Detainee Treatment Act of 2005,
Pub. L. No. 109-148, 119 Stat. 2680 (2005) ..... *passim*

Military Commissions Act of 2006,
Pub. L. No. 109-366, 120 Stat. 2600 (2006) ..... *passim*

MISCELLANEOUS

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1st ed. 1765-69) 15-16

JAMES KENT, COMMENTARIES ON AMERICAN LAW (1873) 12

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) ..6, 9, 16-17

FBI, *GTMO Counterterrorism Division Special Inquiry* (Sept. 9, 2004), *available at* http://foia.fbi.gov/guantanamo/detainees.pdf 5

INTERESTS OF THE *AMICI CURIAE*[1]

Three years ago these *amici* urged the Court to grant review in *Rasul* v. *Bush*, 542 U.S. 466 (2004). The *amici* in *Rasul* came from a wide variety of backgrounds: retired judges, military officers, diplomats, government officials, former POWs, bar leaders and, in the case of Fred Korematsu, an American who had searing personal experience with Executive detention. The *Rasul amici* all urged the Court to take the case because of a profound concern that the Government's detention of individuals at Guantanamo without charge and without access to habeas review presented fundamental issues concerning the rule of law, separation of powers, our country's standing in the world community, and the effect of the Government's detention policy on the safety of American service men and women serving abroad.

This Court did take the case, and almost three years ago held in no uncertain terms that the Guantanamo Detainees were entitled to habeas corpus review to challenge the lawfulness of their detention. But since that decision in June 2004, the Court's mandate has been frustrated and not a single detainee has had a habeas hearing in federal court. Accordingly, the *amici* come before this Court once again to urge the Court to grant review and to decide this case expeditiously because of the extraordinary importance of the issues presented.

Amici and their former positions are as follows: Assistant Secretary of State Diego C. Asencio, Brigadier General David M. Brahms, Ambassador A. Peter Burleigh, Rear Admiral and Judge Advocate General of the Navy

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

Donald J. Guter, State Department Legal Adviser Conrad K. Harper, Assistant Secretary of State Allen Holmes, Rear Admiral and Judge Advocate General of the Navy John D. Hutson, POW Leslie H. Jackson, Circuit Judge Nathaniel R. Jones, Karen Korematsu-Haigh, Assistant Secretary of State Samuel W. Lewis, Chief Judge Abner J. Mikva, USAID Assistant General Counsel Arthur Mudge, Ambassador Richard H. Nolte, Circuit Judge William A. Norris, Ambassador Herbert S. Okun, Under Secretary of State Thomas R. Pickering, Assistant Secretary of State Anthony Quainton, Professor Deborah L. Rhode, Under Secretary of State William D. Rogers, Circuit Judge H. Lee Sarokin, ABA President Jerome J. Shestack, Ambassador Monteagle Stearns, Ambassador Richard N. Viets, Assistant Secretary of State Alexander F. Watson. Please see the Appendix for further information about each of the *amici*.

INTRODUCTION AND SUMMARY OF ARGUMENT[2]

It has been more than five years since the first group of Guantanamo Detainees arrived at Guantanamo Bay, and more than five years since the first of the habeas corpus petitions was filed challenging the military detentions of hundreds of men scooped up around the world and held without charge or trial in the military prison at Guantanamo. The case arising out of that first habeas petition, *Rasul* v. *Bush*, 542 U.S. 466 (2004), reached this Court almost three years ago, when the Court ruled that "federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing." *Id.* at 485. Nearly three years have passed since this Court remanded the *Rasul* cases "for the District Court to consider in the first instance the merits of petitioners' claims." *Ibid.*

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[2] This brief is intended to support the companion petition in *Boumediene* v. *Bush* (No. 06-____) in addition to the above-captioned case.

In all those years—a longer period of time than the length of active American involvement in World War I, World War II, or the Korean War—not a single Guantanamo Detainee has had the legality of his detention adjudicated, on the merits, in a court of law. The court below now has held that, despite *Rasul* and the constitutional guarantee of habeas corpus, no Detainees are entitled to independent judicial review of the lawfulness of their military imprisonment.

Amici urge this Court to grant certiorari to the Detainees and to hear and decide this case as expeditiously as possible. The core promise of the writ of habeas corpus is a promise of prompt adjudication of the lawfulness of detention. Riding circuit during the Civil War, Chief Justice Taney examined the history of the Great Writ. "From the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of habeas corpus, to bring his case before the king's bench." *Ex Parte Merryman*, 17 F. Cas. 144, 150 (1861). Describing England's "great habeas corpus act" of 1679, Chief Justice Taney wrote: "The great and inestimable value of the habeas corpus act [of 1679] is that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties ***promptly***." *Id.* at 150 (emphasis added).

That promise of promptness at the heart of the common law writ of habeas, effectively codified by the Constitution's Suspension Clause, has been denied to the Guantanamo Detainees, despite this Court's clear holding in *Rasul* almost three years ago. As the Detainees demonstrate in their petitions, the core reasoning and holding of *Rasul*—that federal district courts have jurisdiction to hear applications for habeas corpus by Guantanamo Detainees—was undisturbed by the purported revocations of statutory habeas jurisdiction by the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (DTA), and the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (MCA). The Constitution entitles the

Guantanamo Detainees to a prompt and meaningful judicial process to challenge the legal and factual grounds for their detentions.

Amici appreciate the exigencies of the moment. However, the Constitution's Suspension Clause outlines the very limited conditions of national peril in which Congress may suspend the privilege of the writ. The majority opinion of the court below never even addressed whether the DTA or the MCA satisfies the strict limits of the Suspension Clause.

This Court has a long tradition of safeguarding the role of courts in monitoring the validity of Executive detention, even in the most precarious moments of our Nation's history. See *Rasul*, 542 U.S. at 474 (providing examples of when this Court has "recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace," and citing examples from detentions arising out of the Civil War and World War II). Because the common law privilege of the writ of habeas corpus extends to the Guantanamo Detainees and was not validly suspended, federal courts have jurisdiction to reach the merits of the Detainees' claims and the obligation to do so "promptly."

Nevertheless, a divided court of appeals barred the district court from exercising the historic power to test the lawfulness of Executive detention—detention that already has continued without prospect of relief for five years. This is truly a case where justice delayed is justice denied. The Guantanamo Detainees are currently deprived of their liberty in the most fundamental sense. At best, the great majority are held in a maximum security facility, with almost no human contact and at least twenty-two hours per day alone in small, concrete cells.[3] Numerous organizations, including the Federal Bureau of Investigation, have documented

[3] This account derives from the Declaration of Sabin Willett, filed in *Parhat v. Gates*, No. 06-1397 (D.C. Circuit).

instances of abusive treatment. See, *e.g.*, FBI, *GTMO Counterterrorism Division Special Inquiry* (Sept. 9, 2004), *available at* http://foia.fbi.gov/guantanamo/detainees.pdf. *Amici* point to such treatment to underscore the urgency of this Court's adjudication in this matter. As it is, these Detainees must tolerate such conditions without being charged with any crime and without knowing whether their detentions will end at some point in the future, or last for the balance of their lives.

After five long years in harsh military confinement, the time is long past due to begin to inquire into the validity of individual detentions at Guantanamo Bay. The Constitution simply does not allow the Executive or the Legislature to put that inquiry beyond the reach of the courts without complying with the rigors of the Suspension Clause—a test that neither the President nor the Congress suggests could be met here.

ARGUMENT

I. This Court Has A Long Tradition Of Reviewing Executive Detention Pursuant To The Writ Of Habeas Corpus, Even In Times Of National Crisis.

More than five years after the confinement of the Guantanamo Detainees commenced, and almost three years after this Court held that the constitutionally guaranteed common law writ of habeas corpus reaches these Detainees, it is time for the courts to move forward and determine whether the detention of individual detainees at Guantanamo is lawful.

"At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001). This Court has already decided that the Guantanamo Detainees are entitled to access to the writ, so that independent courts can review the legality of the Executive

detentions here. It is long past time that those reviews begin. Only by granting the petitions and expediting consideration of these cases can the Court honor the promise of the writ and protect the integrity of its own decision in *Rasul*.

The "war on terrorism" does not license either the President or Congress to nullify habeas corpus. Justice Story emphasized the importance of making the writ available even in times of crisis, save only situations of actual rebellion or invasion. The writ is a "very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst purposes." JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 208-09 (1833). Throughout our history, this Court and individual Justices have been steadfast in asserting the judicial power under the Constitution, including the power to issue writs of habeas corpus, to ensure that the Executive Branch's assertions of "national security" do not serve as a license for unchecked abuse of liberty. While the Court often has deferred to the judgment of the political branches, the Constitution entrusts to the courts the ultimate protection of individual liberty—especially in times of national anxiety and stress.

The Framers, formulating the Constitution in the shadow of the Revolutionary War, understood that this Nation would face grave threats, and that those threats would put great pressure on the privilege of habeas corpus. They addressed this pressure by precisely limiting the circumstances when the writ may be suspended. The Framers placed the authority to suspend the writ with the Legislature, but confined the circumstances under which that suspension could validly occur: only "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9.

> "[The framers] knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight

> could not tell; and that unlimited power, where lodged at such a time, was especially hazardous to freemen." *Ex parte Milligan*, 71 U.S. 2, 125 (1866).

The writ of habeas corpus stands as our legal system's oldest and most basic protection against the tyranny of unjustified detention. The fact that the Constitution sets extraordinarily high barriers to suspending that protection, even temporarily, underscores the need for vigilance when the requirements of suspension are unmet.

This Court and its Justices have not shirked the responsibility to test the validity of claims by the President or Congress or both that national dangers justify drastic measures violating personal liberty. Shortly after the end of the Civil War, the gravest threat to its existence this Nation has ever faced, this Court warned of the dangers of allowing the pressures of the present to undermine the birthright of this Nation's past. In *Milligan* this Court declared:

> "The Constitution of the United States is a law for rulers and people, *equally in war* and in peace, and covers with the shield of its *protection all classes of men, at all times, and under all circumstances*. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority." *Milligan*, 71 U.S. at 120-21 (emphasis added).

Repeatedly, throughout its history, this Court has made clear that the privilege of the writ remains fully valid even

during times of crisis. As noted in *Rasul*, this Court has a very long tradition of entertaining the writ in a wide variety of Executive detention cases "in wartime as well as in times of peace." *Rasul*, 542 U.S. at 474.

> "The Court has, for example, entertained the habeas petitions of an American citizen who plotted an attack on military installations during the Civil War, *Ex parte Milligan*, 4 Wall. 2 (1866), and of admitted enemy aliens convicted of war crimes during a declared war and held in the United States, *Ex parte Quirin*, 317 U.S. 1 (1942), and its insular possessions, *In re Yamashita*, 327 U.S. 1 (1946)." 542 U.S. at 474-75.

This Court's clear adherence to the continued operation of the writ of habeas corpus even in the context of the Civil War and World War II vindicates the role of federal courts as the ultimate judges of the lawfulness of Executive detention.

Even during our last declared war, World War II, when the Nation was truly at peril and the entire country was on a war footing, this Court asserted the power and responsibility to review the lawfulness of military detentions that the Executive Branch considered necessary. See *Korematsu* v. *United States*, 323 U.S. 214 (1944). The Court ultimately upheld an Executive Order providing for military confinement of persons of Japanese ancestry—over dissents by Justice Jackson and others that history has regarded as more faithful to the Constitution. But it was *the Court* that decided whether the detentions were legally permissible.

In *Ex parte Endo*, 323 U.S. 283 (1944), decided the same day as *Korematsu*, the Court granted a writ of habeas corpus in a case arising from the same World War II military policy of exclusion and detention. The Court reviewed the basis proffered for the Executive detention and found it insufficient, because the petitioner was not a spy or saboteur: "When the power to detain is derived from the power to

protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized." *Id.* at 302.

Once again this Court is called upon to protect the constitutional balance and to assert the continuing vitality of the privilege of the writ of habeas corpus, even in the face of the expedient preference of the political branches to ignore this historic guarantee of human liberty.

II. Federal Courts Have Jurisdiction To Adjudicate Petitions For Writs Of Habeas Corpus By Guantanamo Detainees.

Not only should certiorari be granted, but to protect the function of the writ as assuring "prompt" review, the case should be expedited. The Constitution, codifying the common law function of the writ, requires no less.

A. This Court has already decided that the common law writ of habeas corpus covers the Guantanamo Detainees.

Article I, § 9, cl. 2 of the Constitution declares: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." By articulating the narrow circumstances under which Congress may *suspend* the privilege of the writ of habeas corpus, the Suspension Clause functions as a constitutional codification of the *availability* of the writ—unless validly suspended.

The writ mentioned in the Suspension Clause "is that great and celebrated writ, used in all cases of illegal confinement, known by the name of the writ of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, * * * to do, submit to, and receive, whatsoever the judge or court, awarding such writ, shall consider in that behalf." JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 206 (1833).

This Court has stated that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker* v. *Turpin*, 518 U.S. 651, 663-64 (1996)). The writ requires the Executive to come into court to justify the legality of the detention of the person whom the Executive has imprisoned and who invokes the privilege of the writ, making the court the ultimate judge of the lawfulness of the detention.

There is no need to answer the question anew whether the common law scope of the writ of habeas corpus reaches the Guantanamo Detainees. This Court has already resolved the inquiry:

> "Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control. As Lord Mansfield wrote in 1759, even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.' *King* v. *Cowle*, 2 Burr. 834, 854-855, 97 Eng. Rep. 587, 598-599 (K.B.). Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.' *Ex parte Mwenya*, [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M. R.)." *Rasul*, 542 U.S. at 481-82 (internal footnotes omitted).

This Court, therefore, already has concluded that extending the writ of habeas to the Guantanamo Detainees is

consistent with the common law reach of the writ. The historical basis for this conclusion is amply laid out in the footnotes in the passage quoted above, *id.* at 481-82 nn. 11-14, and in the relevant passage of Judge Rogers's dissent below, *Boumediene* v. *Bush*, __ F.3d __, 2007 WL 506581, at *14 to *16 (D.C. Cir. Feb. 20, 2007) (Rogers, J., dissenting).

By engaging in an analysis of the common law meaning of the writ of habeas corpus in order to determine the application of the habeas statute, this Court in *Rasul* presupposed that the habeas statute was coextensive as a matter of scope (though not necessarily procedure) with the constitutional scope of the writ protected by the Suspension Clause. The Court explicitly grounded its interpretation of the Guantanamo Detainees' statutory right in "the historical reach of the writ of habeas corpus" at common law. *Rasul*, 542 U.S. at 481. *Rasul* also makes clear that it is the common law scope of the writ that the Constitution presupposes, codifies and protects.

Therefore, repeal of the habeas *statute* does not and cannot undermine the historic, constitutionally protected scope of the writ, which the Court held available to the Guantanamo Detainees. The privilege of the writ can be stripped from these men only in compliance with the Constitution's requirements, not at the whim of the Executive or Legislature.

B. The DTA and MCA do not validly bar access to the constitutionally guaranteed common law writ of habeas corpus.

Rasul establishes that the common law writ of habeas corpus as it existed in 1789—the bare minimum scope of the writ guaranteed by the Constitution—applies to the Guantanamo Detainees. In enacting the DTA and MCA and purporting to repeal the statutory basis for habeas jurisdiction over the claims of Guantanamo Detainees, Congress did not

provide an adequate alternative procedure for challenging their detention. Therefore, these statutes necessarily "suspend" the writ and are unconstitutional unless they satisfy the Suspension Clause.

By explicitly circumscribing any governmental intrusion on the reach of the writ as it was understood at common law, the Suspension Clause creates constitutional protection for habeas corpus. See JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 33 (1873) ("The privilege of this writ is also made an express constitutional right at all times, except in cases of invasion or rebellion, by the Constitution of the United States."). The Constitution presupposes that this structural right belongs to all persons who would have enjoyed the privilege at common law. By its express terms as part of Article I, § 9, the Clause functions as a limitation on Congressional power, prescribing the limited conditions under which Congress can contract the scope of the writ.[4]

The parties below briefed, and Judge Rogers addressed extensively, the infirmity of the DTA and MCA when they are viewed, as they must, as operating to suspend the constitutionally assured privilege of the writ. Judge Rogers demonstrated that the alternative procedures followed by the combatant status review tribunals (CSRTs) do not provide a constitutionally adequate alternative procedure to a writ of habeas corpus for challenging Executive detention. These so-called "tribunals" are not the kind of court that the writ assumes—a court independent of the Executive, as the common law courts were independent of the King. These "tribunals" are part of the military establishment in the Executive Branch, and it is the very purpose of the writ to subject Executive detention to *independent* judicial review.

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[4] Dissenting below, Judge Rogers demonstrated how the Suspension Clause functions as a limitation on congressional power. See *Boumediene*, 2007 WL 506581, at *10 to *12 (Rogers, J., dissenting).

The CSRTs' other infirmities include, *inter alia*, that the detainee (1) "bears the burden of coming forward with evidence explaining why he should not be detained," (2) "need not be informed of the basis for his detention," (3) "need not be allowed to introduce rebuttal evidence," (4) "must proceed without the benefit of his own counsel," and (5) can have his detention justified by "evidence resulting from torture." *Boumediene*, 2007 WL 506581, at *18 to *19 (Rogers, J., dissenting).

The DTA and MCA also do not comply with the Suspension Clause because, unlike previous, valid suspensions of the writ, the statutes make no reference to "rebellion" or "invasion," were not passed during a period of rebellion or invasion, and are not limited to the duration of any "necessity." Furthermore, it is dispositive that "there is no indication that Congress even sought to avail itself of the exception in the Suspension Clause." *Id.* at *20.

Under the opinion of the court below, there can be no federal court review whatsoever of the basis for indefinite, uncharged detention of the Guantanamo Detainees beyond the narrow review provided by the DTA. Limited review in the D.C. Circuit of an adverse determination by a CSRT does not adequately replace the searching inquiry guaranteed by habeas corpus, when a person is being detained without charge and before any conviction by *any* process. The DTA allows judicial review of the record of the CSRT only to "assess whether the CSRT has complied with its own standards." *Boumediene*, 2007 WL 506581, at *19 (Rogers, J., dissenting); DTA § 1005(e)(2), 119 Stat. at 2742. Under this new regime, the Guantanamo Detainees cannot obtain what habeas assures, an independent judicial determination whether lawful grounds exist to continue to imprison them.

C. The court of appeals majority opinion is inconsistent with *Rasul* and not mandated by *Eisentrager*.

Amici have discussed above how a straightforward application of *Rasul* is inconsistent with the court of appeals decision in this case. The majority below contended that "[e]ven if *Rasul* somehow calls *Eisentrager*'s constitutional holding into question, as detainees suppose, we would be bound to follow *Eisentrager*." *Boumediene*, 2007 WL 506581, at *7 n.10. That seeming deference to *Eisentrager* erects a false conflict that the Court in *Rasul* disclaimed.

First, *Johnson* v. *Eisentrager*, 399 U.S. 763 (1950), did not address the constitutional right to a writ of habeas corpus by petitioners in the position of the Guantanamo Detainees, who, unlike the petitioners in *Eisentrager*, are located in a place where the United States has the right to "exercise complete jurisdiction and control." *Rasul*, 542 U.S. at 471 (quoting 1903 Lease for Guantanamo base). In this context, the majority below was simply wrong in asserting that "[a]ny distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held, is immaterial to the application of the Suspension Clause." *Boumediene*, 2007 WL 506581, at *7. In *Rasul* this Court expressly concluded that the Guantanamo Detainees "differ from the *Eisentrager* detainees" in part because "they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." 542 U.S. at 476. Justice Kennedy's concurrence laid out in detail how "Guantanamo Bay is in every practical respect a United States territory." *Id.* at 487 (Kennedy, J., concurring in the judgment).

Second, the court below never came to terms with the numerous other relevant ways the *Rasul* Court determined that the Guantanamo Bay detainees were "differently situated from the *Eisentrager* detainees." *Rasul*, 542 U.S. at 476. The court of appeals ignored Justice Kennedy's detailed analysis of how "follow[ing] the framework of *Eisentrager*"

leads to the conclusion that the detainees are entitled to the privilege of the writ of habeas corpus. *Rasul*, 542 U.S. at 485-88. Neither this Court nor Justice Kennedy in his concurrence ever suggested that amending the habeas statute could, consistent with the Constitution, properly suspend the Guantanamo Detainees' right to petition for a writ of habeas corpus.

Furthermore, there is no historical support for the position that the common law writ of habeas corpus as it existed in 1789 would *not* have extended to persons in the position of the Guantanamo Detainees. As Judge Rogers pointed out, the panel majority could "point to no case where an English court has refused to exercise habeas jurisdiction because the alleged enemy being held, while under the control of the Crown, was not within the Crown's dominions. * * * The question is whether by the process of inference from similar, if not identical, situations the reach of the writ at common law would have extended to the detainees' petitions." *Boumediene*, 2007 WL 506581, at *14.

In *Rasul* the Court expressly ruled that habeas jurisdiction over the claims of Guantanamo Detainees "is consistent with the historical reach of the writ of habeas corpus." 542 U.S. at 481. Respect for this Court's analysis should have led the court below to follow the Court's precedent and, indeed, its mandate in these related cases.

D. The writ of habeas corpus carries the promise of prompt, substantive review, which the decision below frustrates.

Blackstone, writing almost a quarter of a millennium ago, described the writ of habeas corpus as the most basic test of the validity of imprisonment:

> "To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering it's

> protection impossible: but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an *habeas corpus* may examine it's validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner." WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 133 (1st ed. 1765-69).

Blackstone's description of the functioning of the writ at common law not only expresses the conception of the writ as the law's most basic protection against the tyranny of an unjustified detention. He also describes the force the writ had at common law to compel the Executive, in seeking to justify detentions, to account to the independent law courts. As Judge Rogers put it in her dissent in this case: "Throughout history, courts reviewing the Executive detention of prisoners have engaged in searching factual review of the Executive's claims." *Boumediene*, 2007 WL 506581, at *22. This is what Blackstone meant when he described the "absolute necessity of expressing upon every commitment the reason for which it is made," so that a court "may examine its validity" upon a writ of habeas corpus.

Justice Joseph Story also spoke of the writ's substantive assurance of basic review of the sufficiency of the claimed grounds for detention. In his COMMENTARIES, he declared that the writ of habeas corpus is

> "justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement; and *if no sufficient ground of detention appears, the party is entitled to his immediate*

> *discharge*. This writ is most beneficially construed; and is applied in every case of illegal restraint, whatever it may be; for *every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever the manner, in which the restraint is effected*." JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 206 (1833) (emphasis added).

The Suspension Clause, by impliedly codifying the availability of the common law writ, also codified the common law remedy. And that remedy is, at the very least, thorough scrutiny of the Executive's claimed, factual grounds for detention, accompanied by the right to be set free if the court finds no legitimate grounds for detaining the person. Without guaranteeing such a remedy, the writ carries none of its common law force and is effectively suspended in violation of the Suspension Clause.

The precise scope of habeas review may depend upon the nature of the procedures that led to the detention under review, but habeas review always scrutinizes the factual basis underlying the Executive's assertion that the detainee is subject to military detention in the first place. The Court has been willing to limit its review of military detentions after *conviction* of a crime by a military tribunal, so long as that military tribunal has valid jurisdiction over the person. That is, *the reviewing court* first must be satisfied that the person's status made him *subject to military detention.*

In each of the three pivotal cases cited by the Court in *Rasul* as examples of habeas review in wartime—*Milligan, Quirin*, and *Yamashita*—the petitioners had been tried and convicted by a military tribunal.[5] In each of those cases, the

[5] The convictions that were being reviewed were the result of a formal trial process very different from the essentially *ex parte* process the CSRTs provide to the Guantanamo Detainees. See

Court determined that the threshold question in testing the validity of military detention was whether, in fact, the person's individual status made him subject to military authority at all. See *Milligan*, 71 U.S. at 108 (explaining that Milligan insisted, correctly, that as a non-combatant civilian "said military commission had no jurisdiction to try him"); *Quirin*, 317 U.S. at 19 (describing as "stipulated" and "undisputed" the petitioners' status as German soldiers conducting illegal wartime activities); *Yamashita*, 327 U.S. at 5 (accepting petitioner's role as Commanding General of the Imperial Japanese Army in the Philippine Islands as established by "the petitions and supporting papers"). See also *Reid* v. *Covert*, 354 U.S. 1 (1957) (Constitution ordinarily precludes military tribunals from asserting jurisdiction to detain and try civilians).

In this case, the Guantanamo Detainees present the threshold question whether there is a factual basis for their detentions. The validity of any detention turns on underlying facts about the individual Detainee's status as an actual combatant in a quasi-military campaign against the United States. Those facts are sharply disputed. There is substantial reason to believe that the CSRT process is not a reliable way to resolve those factual disputes fairly. In any event, it is the office of the Great Writ to subject the operative facts on which detention turns to searching inquiry by an independent court.

To test whether there is valid cause for confinement, a court entertaining a petition for a writ of habeas corpus must look beyond the CSRT process to inquire into the factual basis itself. See *Boumediene*, 2007 WL 506581, at *23 (Rogers, J., dissenting) ("There is good reason to treat

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Boumediene, 2007 WL 506581, at *23 (Rogers, J., dissenting) ("The robustness of the review [the Guantanamo Detainees] have received to date differs by orders of magnitude from that of the military tribunal cases.").

differently a petition by an uncharged detainee—who could be held indefinitely without even the prospect of a trial or meaningful process—from that of a convicted war criminal.").

The type of review assured by the writ of habeas corpus can be found in *Ex parte Bollman*, 8 U.S. 75 (1807), an early habeas opinion authored by Chief Justice Marshall. In *Bollman*, this Court reviewed the detention of two persons accused of levying war against the United States but not yet charged. The situation was analogous to that of the Guantanamo Detainees. The Court proceeded "to do that which the court below ought to have done." *Id.* at 114. In proceedings stretching over five days and with the prisoners present in court, it "fully examined and attentively considered" on an item-by-item basis "the testimony on which they were committed," held it insufficient and ordered their discharge. *Id.* at 125, 128-36. See *Boumediene*, 2007 WL 506581, at *22 to *23 (Rogers, J., dissenting) for a discussion of other cases reviewing Executive detentions and conducting "searching factual review of the Executive's claims" pursuant to an application for a writ of habeas corpus, even in wartime.

Justice Kennedy, in his *Rasul* concurrence, crisply explained how indefinite detention without trial implicates the privilege of a writ of habeas corpus in a more compelling way than detention resulting from conviction by a court or even a properly constituted military tribunal:

> "Indefinite detention without trial or other proceeding presents altogether different considerations [than being tried and convicted by a military commission]. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus." *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring in the judgment).

Despite this Court's explicit holding in *Rasul* that the common law reach of habeas corpus extends to the Guantanamo Detainees, and its explicit statement in *St. Cyr* that the common law reach is the "absolute minimum" scope of the writ, the court of appeals has nevertheless disallowed what Justice Story described as "the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement." As Justice Kennedy explained in his *Rasul* concurrence, "[T]here are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated." 542 U.S. at 487 (Kennedy, J., concurring in the judgment).

The Guantanamo Detainees have been seeking this judicial scrutiny for five years. At every turn, the Executive (now with congressional cooperation) has sought to frustrate their resort to the Great Writ. By tolerating this evasion, the court of appeals abandoned the historic duty of the judiciary as enshrined in the Constitution. Only prompt action by this Court can restore the integrity of the Great Writ and protect its own mandate in *Rasul*.

The Guantanamo Detainees do not ask for anything more than this Court acknowledged was their due almost three long years ago. All they ask is to be able to have an independent court inquire whether they are rightfully detained. After more than five years in harsh military confinement, with no end in sight and no knowledge whether an end even exists, it is time for the courts to begin that inquiry and determine the merits of their claims.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for expedited briefing and argument.

Respectfully submitted.

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APPENDIX

APPENDIX
AMICI INFORMATION

The *amici* are as follows:

Diego C. Asencio served as Ambassador to Colombia from 1977 to 1980, Assistant Secretary of State for Consular Affairs from 1980 to 1983, Ambassador to Brazil from 1983 to 1986, and Chairman of the Commission for the Study of International Migration and Cooperative Economic Development from 1987 to 1989.

Brigadier General David M. Brahms served in the Marine Corps from 1963 through 1988, with a tour of duty in Vietnam, and was the senior legal advisor for the Marine Corps from 1985 through 1988, when he retired from the military. General Brahms is currently in private practice in Carlsbad, California and is a member of the Board of Directors of the Judge Advocates Association.

A. Peter Burleigh served as Ambassador and Coordinator for Counter-Terrorism from 1991 to 1992, Ambassador to Sri Lanka and the Maldives from 1995 to 1997, and Ambassador and Deputy Permanent Representative to the United Nations from 1997 to 1999.

Rear Admiral Donald J. Guter was a line officer in the United States Navy from 1970 through 1974. After a break for law school, he returned to the Navy in 1977 and remained in the Navy until 2002, when he retired from the military. He served as the Navy's Judge Advocate General from June 2000 through June 2002. Rear Admiral Guter was in the Pentagon when it was attacked by terrorists on September 11, 2001. He is currently the Dean of Duquesne Law School in Pittsburgh, Pennsylvania.

Conrad K. Harper served as Legal Adviser of the United States Department of State from 1993 to 1996. He is a lawyer in private practice in New York City with Simpson Thacher & Bartlett LLP and has been a member of the Permanent Court of Arbitration at The Hague. He has

previously been a member of and held leadership positions in a range of other bar, human rights and international organizations. His law firm is counsel to two Saudi detainees in *Alsaaei* v. *Bush*, No. 05-2369 (D.D.C.) and *Al Darby* v. *Bush*, No. 05-2371 (D.D.C.).

Allen Holmes served as Ambassador to Portugal from 1982 to 1985, Assistant Secretary of State for Political-Military Affairs from 1985 to 1989, and Assistant Secretary of Defense for Special Operations and Low Intensity Conflict from 1993 to 1999.

Rear Admiral John D. Hutson served in the United States Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. He is presently the Dean and President of the Franklin Pierce Law Center in Concord, New Hampshire.

Leslie H. Jackson is a former American prisoner of war detained by the German government during World War II. Mr. Jackson is the Executive Director of American Ex-Prisoners of War, a non-profit, congressionally chartered veterans organization that represents approximately 50,000 former prisoners of war and their families.

Hon. Nathaniel R. Jones served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002. Prior to taking the bench, he served as General Counsel for the National Association for the Advancement of Colored People from 1969 to 1972, and as Co-Chair, U.S. Department of Defense Civil-Military Task Force on Military Justice in 1972.

Karen Korematsu-Haigh is the daughter of Fred Korematsu, the petitioner in *Korematsu* v. *United States*, 323 U.S. 214 (1944), who died in 2005. Ms. Korematsu-Haigh continues to work to preserve her father's legacy, and is Co-founder of The Fred Korematsu Civil Rights Education Center, established in 1989 in association with the Asian Law Caucus, San Francisco.

Samuel W. Lewis served as Assistant Secretary of State for International Organization Affairs from 1975 to 1977, Ambassador to Israel from 1977 to 1985, and Director of the State Department Policy Planning Staff from 1993 to 1994.

Hon. Abner J. Mikva served as a judge on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1994, and as Chief Judge from 1991 to 1994. He also served as White House Counsel from 1994 to 1995. Prior to taking the bench, he served five terms as a member of Congress, representing portions of Chicago and its suburbs.

Arthur Mudge served as USAID Assistant General Counsel from 1967 to 1969, USAID Mission Director in Guyana from 1974 to 1976, USAID Mission Director in Nicaragua from 1976 to 1978, and USAID Mission Director in Sudan from 1980 to 1983.

Richard H. Nolte served as Ambassador to Egypt in 1967.

Hon. William A. Norris served as a judge on the United States Court of Appeals for the Ninth Circuit from 1980 to 1997.

Herbert S. Okun served as Ambassador to the German Democratic Republic from 1980 to 1983, Ambassador and Deputy Permanent Representative to the United Nations from 1985 to 1989, and United States Member of the Group of International Advisors to the International Committee of the Red Cross from 1996 to 2000. He was Visiting Lecturer in International Law at Yale Law School from 1991 to 2002.

Thomas R. Pickering served as Ambassador to Jordan (1974 to 1978), Assistant Secretary of State for Oceans, Environment and Science (1978 to 1981), Ambassador to Nigeria (1981 to 1983), Ambassador to El Salvador (1983 to 1985), Ambassador to Israel (1985 to 1988), Ambassador and Representative to the United Nations (1989 to 1992), Ambassador to India (1992 to 1993), Ambassador to the

Russian Federation (1993 to 1996), and Under Secretary of State for Political Affairs (1997 to 2001).

Anthony Quainton served as Ambassador to Central African Republic from 1976 to 1978, Ambassador to Nicaragua from 1982 to 1984, Ambassador to Kuwait from 1984 to 1987, Ambassador to Peru from 1989 to 1992, and Assistant Secretary of State for Diplomatic Security from 1992 to 1995.

Deborah L. Rhode is the Ernest W. McFarland Professor of Law at the Stanford University School of Law and served as Senior Counsel to Minority Members of the Judiciary Committee of the U.S. House of Representatives in 1998.

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(1) (3)

Nos. 06-1195 and 06-1196

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

KHALED A. F. AL ODAH, *et al.*,
Petitioners,

v.

UNITED STATES, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF UNITED STATES SENATOR ARLEN SPECTER IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. The MCA Precludes Habeas Relief in Pending Cases	4
II. The Great Writ Extends to Guantanamo Detainees	5
III. The Framework For Challenging Detention Is an Insufficient Substitute for the Great Writ	10
A. The Framework Lacks an Independent Tribunal	11
B. The Framework Lacks an Imperative Remedy	12
C. The Framework Fails to Afford a Fair Opportunity to Rebut the Accusations	15
IV. This Court's Guidance is Necessary as a Bulwark of Liberty	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	Page
Balzac v. Porto Rico, 258 U.S. 298 (1922)	15
Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007)	*passim*
Cuban Am. Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412 (11th Cir. 1995)	15
Delaney v. Matesarez, 264 F.3d 7 (1st Cir. 2001).	10
Dorr v. United States, 195 U.S. 138 (1904)	16
Felker v. Turpin, 518 U.S. 651 (1996)	10
Gherebi v. Bush, 352 F.3d 1287 (9th Cir. 2003)	7, 8, 9
Gov't of the Canal Zone v. Scott, 502 F.2d 566 (5th Cir. 1974)	15
Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992)	15
Hamdi v. Rumsfeld, 542 U.S. 507 (2004)	*passim*
Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006)	3, 12
In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005)	18
INS v. St. Cyr, 533 U.S. 289 (2001)	5, 10
Johnson v. Eisentrager, 339 U.S. 763 (1950)	*passim*
King v. Cowle, 97 Eng. Rep. 587 (K.B. 1759)	6
Korematsu v. United States, 323 U.S. 214 (1944)	9
Lonchar v. Thomas, 517 U.S. 314 (1996)	11, 12
McCleskey v. Zant, 499 U.S. 467 (1991)	12
Miller v. Marr, 141 F.3d 976 (10th Cir. 1998)	10
Preiser v. Rodriguez, 411 U.S. 475 (1973)	13
Price v. Johnston, 334 U.S. 266 (1948)	12
Rasul v. Bush, 542 U.S. 466 (2004)	*passim*
Sanders v. United States, 373 U.S. 1 (1963)	10
Souter v. Jones, 395 F.3d 577 (6th Cir. 2005)	10
Swain v. Pressley, 430 U.S. 372 (1977)	5, 10
United States v. Hayman, 342 U.S. 205 (1952)	10
United States v. Lee, 906 F.2d 117 (4th Cir. 1990)	7

TABLE OF AUTHORITIES—Continued

Page

United States v. Rogers, 388 F. Supp. 298 (E.D. Va. 1975) 7
United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 16
Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948) 9, 15
Wilkinson v. Dotson, 544 U.S. 74 (2005) 13
Zadvydas v. Davis, 533 U.S. 678 (2001) 15, 16

UNITED STATES CONSTITUTION

Article I, Section 9, Clause 2 ..... 2, 5

STATUTES AND BILLS

10 U.S.C. § 950j 4
28 U.S.C. § 2241 ..... *passim*
28 U.S.C. § 2255 ..... 10, 13
Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 ..... *passim*
Effective Terrorists Prosecution Act of 2006, S.4060, 109th Cong. 19
Habeas Corpus Restoration Act of 2006, S.4081, 109th Cong. 19
Habeas Corpus Restoration Act of 2007, S.185, 110th Cong. 19
Judiciary Act of 1789, 1 Stat. 73 2
Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ..... *passim*
S.A. 5087, 109th Cong. (2006) 19

TREATIES AND OTHER AGREEMENTS

Availability of Certain Indian Ocean Islands for Defense Purposes, Dec. 30, 1966, U.S.-U.K., 18 U.S.T. 28 8

TABLE OF AUTHORITIES—Continued

Page

Defense of Greenland, June 8, 1951, U.S.-Den., 2 U.S.T. 1485 8

Establishment of Long Range Aid to Navigation Station in the Bahama Islands, June 24, 1960, U.S.-U.K., 11 U.S.T. 1587 8

Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, T.S. No. 426 7

Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S-Cuba, T.S. No. 418 ..... 6, 7

Mutual Defense Treaty, Oct. 1, 1953, U.S.-S. Korea, 5 U.S.T. 2368 8

Treaty Between the United States and Cuba Defining Their Relations, May 29, 1934, US-Cuba, T.S. No. 866 6

Treaty Regarding United States Defence Areas and Facilities in Antigua, Jan. 1, 1978, U.S.-Ant. & Barb., 29 U.S.T. 4183 8

CONGRESSIONAL RECORD

Volume 151 19

Volume 152 ..... 5, 19

Volume 153 19

COMMITTEE HEARINGS

Detainees: Hearing Before the Senate Committee on the Judiciary, 109th Cong. (June 15, 2005) ... 19

Examining Proposals to Limit Guantanamo Detainees' Access to Habeas Corpus Review: Hearing Before the Senate Committee on the Judiciary, 109th Cong. (Sept. 25, 2006) 19

Hamdan v. Rumsfeld: Establishing a Constiutional Process: Hearing Before the Senate Committee on the Judiciary, 109th Cong. (July 11, 2006) 19

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS Page

35 Op. Att'y Gen. 536 (1929) 15
Dep't of Defense, Transcript of CSRT Hearing for ISN 10024 (Mar. 10, 2007) 1
Dep't of Defense, Transcript of Press Conference (Mar. 6, 2007) 14
R. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFFALO L. REV. 103 (1951) 20
Memorandum for Secretaries of the Military Departments, Revised Implementation of Administrative Review Procedures (July 14, 2006) 13, 14
Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) ("CSRT Order") 2, 13
Memorandum of the Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures (July 29, 2004) ("CSRT Rules") ..... *passim*
G. L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197 (1996) 8, 9, 15
D. Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST. Nov. 2, 2005 8
D. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59 (2006) 16
Statement by the Government of Cuba to the National and International Public Opinion (Jan. 11, 2002) 7
K. L. Storrs & C. Veillette, CRS Report, *Andean Regional Initiative (ARI): FYI 2003 Supplemental and FY 2004 Assistance for Colombia and Neighbors* (Jan. 31, 2004) 8

TABLE OF AUTHORITIES—Continued

Page

M. Wald, *U.S. Curbs Low-Flight Training in Italy Near '98 Ski-Lift Deaths*, N.Y. TIMES, Mar. 11, 1999..... 8

J. White, *Alleged Architect of 9/11 Confesses To Many Attacks*, WASH. POST., Mar. 15, 2007..... 1

INTEREST OF *AMICUS CURIAE*[1]

Amicus is the Ranking Member of the Senate Committee on the Judiciary.. During the 109th Congress, when the Military Commissions Act of 2006 and the Detainee Treatment Act of 2005 moved through the Senate, *amicus* was Chairman of the Committee and held several hearings to consider whether it is constitutionally permissible for Congress to deny the right of habeas corpus to detainees held at the United States Naval Station at Guantanamo Bay. Therefore, *amicus*, being intimately familiar with the statutory provisions implicated in these cases, urges this Court to grant review and to resolve the constitutional questions presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States began sending alien detainees to Guantanamo over five years ago, having previously found them to be enemy combatants when they were initially captured. During that time, some 390 detainees have been released, and others have been added. In total, the base remains home to 385 detainees, of whom eighty have been designated for release. By all accounts, there are some very dangerous individuals residing within the walls of Guantanamo. Toward the end of 2006, for example, the government transferred fourteen "high value" detainees to the base, including the alleged (and now, apparently, confessed) 9/11 mastermind, Khalid Sheikh Muhammad.[2] Moreover, reports indicate some twenty former detainees may have returned to the

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[1] This brief is filed with the consent of the parties. The parties' letters of consent will be filed together with this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no other person, other than *amicus* and its counsel, made a monetary contribution to its preparations or submission.

[2] *See* Dep't of Defense, Transcript of CSRT Hearing for ISN 10024 (Mar. 10, 2007); J. White, *Alleged Architect Of 9/11 Confesses To Many Attacks*, WASH. POST, Mar. 15, 2007, at A1.

battlefield to face U.S. forces. Given the lengthy debates and disagreements among Members of Congress as to the handling of these detainees, and the perception that the United States Court of Appeals for the District of Columbia Circuit failed to follow this Court's direction in *Rasul v. Bush*, 542 U.S. 466 (2004), this Court should review these cases this term.

The question presented here is not whether some of the individuals should continue to be detained. They should. The question is whether the U.S. Constitution ensures that the writ of habeas corpus is available for detainees to contest the legality of their detention by the executive.

The writ of habeas corpus is an age-old remedy for unlawful detention at the hands of the executive. The Founders imported this common law right from England; afforded it constitutional protection in the Suspension Clause, U.S. CONST. art. I., § 9, cl. 2; and authorized the federal courts to issue the writ, *see* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

Three years ago, in *Rasul*, this Court explained that the common law writ extends to both citizens and aliens within United States territory. 542 U.S. at 481. In turn, the Court reasoned that because the United States exercises exclusive jurisdiction and control over Guantanamo, "[a]pplication of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus." *Id.*; *see* 28 U.S.C. § 2241 (2000). Shortly thereafter, the Department of Defense (DoD) instituted Combatant Status Review Tribunals (CSRTs) to ascertain whether each detainee should still be considered an enemy combatant and remain detained at the Guantanamo facility. *See* Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) ("CSRT Order"); Memorandum of the Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures (July 29, 2004) ("CSRT Rules").

The following year, with the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (DTA), Congress purported to preclude habeas petitions from Guantanamo detainees while providing for a limited review of CSRT determinations in the D.C. Circuit. *Id.* § 1005(e). In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the Supreme Court held that this so-called jurisdiction-stripping provision did not apply to pending cases and therefore found it unnecessary to address its constitutional implications. In response, Congress passed the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (MCA), to preclude detainee habeas petitions in all cases (pending and future).

In the present cases, the court of appeals relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in holding that the Guantanamo detainees have no constitutional right to seek habeas relief because Guantanamo is not within the sovereign territory of the United States. *Boumediene v. Bush*, 476 F.3d 981, 990-92 (D.C. Cir. 2007). This decision flies directly in the teeth of this Court's reasoned conclusion in *Rasul* as to Guantanamo's unique territorial status, which places it within the "historical reach of the writ" as it existed at common law prior to and during the founding era.

The procedures for reviewing enemy combatant status provided pursuant to the DTA and MCA depart dramatically from the core features of habeas relief and are, thus, a wholly inadequate substitute. In particular, they fail to provide an independent forum, an imperative remedy, and a fair opportunity to contest enemy combatant status.

Congress has struggled with the important constitutional questions presented in these cases. The arguments have been aired and re-aired. The time is ripe for this Court to address the constitutional infirmity of the MCA's attempt to curtail the right of habeas corpus. Habeas must be restored to ensure that the rule of law prevails at Guantanamo. This Court should grant review and resolve the matter this term.

ARGUMENT

I. The MCA Precludes Habeas Relief in Pending Cases

As a preliminary matter, this Court should decline Petitioners' invitation to exempt pending cases from the ambit of the MCA. *See Boumediene* Pet. 12-14; *Al Odah* Pet. 25-26. The Petitioners' argument is little more than a red herring aimed at avoiding this Court's review of the pressing constitutional issues. The language of the statute is straightforward: it precludes pending and future actions, both habeas and non-habeas (except for CSRT appeals in the D.C. Circuit), that relate to "any aspect of the detention, transfer, treatment, trial, or conditions of confinement." *See* MCA § 7 (codified at 28 U.S.C § 2241(e)).

Section 7(a) of the MCA removes (1) "jurisdiction to hear or consider an application for a writ of habeas corpus" and (2) "jurisdiction to hear or consider any *other* action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement." (Emphasis added). In turn, section 7(b) states that "subsection (a) . . . shall apply to *all cases, without exception,* pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention." (Emphasis added). Although this list mirrors the list found in the second clause of section 7(a), it does not mean that section 7(b) exempts habeas cases. To the contrary, section 7(b) explicitly references the entirety of 7(a) and conspicuously omits the word "other"—a qualifier used in section 7(a) to address non-habeas actions. In short, there is no significance to section 7(b)'s use of one clause to refer to what section 7(a) refers to in two clauses. *Cf.* MCA § 3(a) (adding 10 U.S.C. § 950j).

Moreover, as Congress debated and passed the MCA, both the Members who supported and the Members who opposed

these provisions recognized the effect on pending habeas cases. *See, e.g.*, 152 CONG. REC. S10357 (Sept. 28, 2006) (Sen. Leahy) ("This new bill strips habeas jurisdiction retroactively, even for pending cases."); *id.* at S10404 (Sen. Sessions) ("I don't see how there could be any confusion as to the effect of this act on the pending Guantanamo litigation.").[3] Similarly, the court below unanimously agreed that the statute impacts pending habeas cases. *Boumediene*, 476 F.3d at 986-88; *id.* at 999 (Rogers, J., dissenting).

Any attempt to avoid this interpretation runs headlong into the plain text and the clear understanding of the legislators. *See Swain v. Pressley*, 430 U.S. 372, 378 n.11 (1977). As a consequence, this Court should move past the statutory argument and determine whether the MCA's jurisdiction-stripping provisions are constitutional.

II. The Great Writ Extends to Guantanamo Detainees

The Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST., art. I, § 9, cl. 2. At a minimum, this constitutional protection extends to the writ as it existed at common law in 1789. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). Although it has expanded since that time, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *Id.*

In *Rasul*, this Court held that the federal habeas statute was available to aliens being detained at Guantanamo. *See* 542 U.S. at 485; 28 U.S.C. § 2241 (2000). In reaching this conclusion, the Court reasoned that extending habeas to such

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[3] *Accord* 152 CONG. REC. S11197 (Dec. 5, 2006) (Sen. Specter); *id.* at S10364-65 (Sept. 28, 2006) (Sens. Smith and Levin); *id.* at S10269-70 (Sept. 27, 2006) (Sen. Kyl); *id.* at H7544-45 (Rep. Sensenbrenner).

individuals was "consistent with the historical reach of the writ of habeas corpus," given that Guantanamo was "territory over which the United States exercises exclusive jurisdiction and control." *Rasul*, 542 U.S. at 476, 481-82. At common law, the Court declared, "even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.'" *Id.* at 482 (quoting *King v. Cowle*, 97 Eng. Rep. 587, 598-99 (K.B. 1759)).

The court of appeals held that "[t]he text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba—not the United States—has sovereignty over Guantanamo Bay." *Boumediene*, 476 F.3d at 992. However, this conclusion is irrelevant given that, under *Rasul*, the "historical reach of the writ" turns not on *de jure* sovereignty, but rather on *de facto* exclusive jurisdiction and control.

It bears emphasizing that Guantanamo, for the reasons mentioned in *Rasul*, is uniquely situated. 542 U.S. at 471, 480-81. Under the 1903 lease agreement ("*Lease*"), although Cuba retains "ultimate sovereignty," the United States "shall exercise complete jurisdiction and control over and within said areas."[4] Also, pursuant to a subsequent treaty, the arrangement is to last indefinitely and it cannot be unilaterally terminated by Cuba.[5] As Justice Kennedy explained, "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . From a practical perspective, the indefinite lease . . . has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Rasul*,

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[4] Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418.

[5] *See* Treaty Between the United States and Cuba Defining Their Relations, May 29, 1934, U.S.-Cuba, art. III, T.S. No. 866.

542 U.S. at 487 (concurring opinion) (quoting *Eisentrager*, 339 U.S. at 777-78).

Additional facts illustrate this exclusive control. First, under the lease agreement, "[t]he United States exercises exclusive criminal jurisdiction over all persons, citizens and aliens alike, who commit criminal offenses at the Base[.]" *Gherebi v. Bush*, 352 F.3d 1278, 1289 (9th Cir. 2003), *vacated on other grounds*, 542 U.S. 952 (2004).[6] Second, the United States has the power of eminent domain at Guantanamo. *See Lease*, art. III. Third, when Fidel Castro severed water and supplies to the base in 1964, the base promptly "became and remains entirely self-sufficient, with its own water plant, schools, transportation, entertainment facilities, and fast-food establishments." *Gherebi*, 352 F.3d at 1295. Fourth, although Cuba has declared its belief that the United States has not adhered to restrictions in the original agreement, Cuba nonetheless has recognized that it is powerless to do anything about it.[7] Fifth, the base remains in place despite the decidedly rocky relations between the United States and Cuba.

The contrast between Guantanamo and other American military bases, past and present, further highlights the point.

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[6] *See* Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, art. IV, T.S. No. 426; *United States v. Lee*, 906 F.2d 117, 117 & n. 1 (4th Cir. 1990) (Jamaican national charged with sexual abuse occurring at Guantanamo); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (U.S. civilian employee at Guantanamo Bay under contract with the Navy was prosecuted for drug offenses and tried in Virginia).

[7] *Compare Lease*, Art. II (permitting the United States "generally to do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose"), *with* Statement by the Government of Cuba to the National and International Public Opinion (Jan. 11, 2002) ("Cuba could do absolutely nothing to prevent [other activities]."), *available at* http://ciponline.org/cuba/cubaproject/cubanstatement.htm (last visited Mar. 15, 2007).

For example, Diego Garcia, located in the Indian Ocean, is operated under an agreement with Great Britain that, unlike the Guantanamo lease, is terminable by either party.[8] Similarly, the United States has operated various military facilities under agreements that run only for a specific period of time,[9] articulate very narrow purposes,[10] or provide for joint control.[11] Indeed, Landsberg, the post-WWII prison in Germany that housed the petitioners in *Eisentrager*, was operated "under three flags" (United States, Great Britian, and France). *Gherebi*, 352 F.3d at 1287 n.10. In still other instances of American control abroad, the host country has pressured the United States to leave or make changes.[12] Such is not the case at Guantanamo, where the United States "is

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[8] *See* Availability of Certain Indian Ocean Islands for Defense Purposes, Dec. 30, 1966, U.S.-U.K., para. 11, 18 U.S.T. 28 (terminating two years after "either Government shall have given notice of termination to the other"); *see also, e.g.*, Establishment of Long Range Aid to Navigation Station in the Bahama Islands, June 24, 1960, U.S.-U.K., art. XXVI, 11 U.S.T. 1587; Mutual Defense Treaty, October 1, 1953, U.S.-S. Korea, art. VI, 5 U.S.T. 2368.

[9] *See, e.g.*, Treaty Regarding United States Defence Areas and Facilities in Antigua, Jan. 1, 1978, U.S.-Ant. & Barb., art. XXIV, 29 U.S.T. 4183 ("This Agreement shall come into force on January 1, 1978, and shall remain in force through December 31, 1988.").

[10] *See, e.g.*, K. L. Storrs & C. Veillette, CRS Report, *Andean Counterdrug Initiative (ACI) and Related Funding Programs: FY2005*, at 18 (May. 10, 2005) (describing agreement for use of location "solely for the detection of drug trafficking flights in the region").

[11] *See, e.g.*, Defense of Greenland, June 8, 1951, U.S.-Den., art. II, 2 U.S.T. 1485.

[12] *See, e.g.*, D. Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST., Nov. 2, 2005, at A1 (reporting that, in 2003, the Thai government insisted CIA shut down "black" site where it was holding and interrogating suspected terrorists); M. Wald, *U.S. Curbs Low-Flight Training in Italy Near '98 Ski-Lift Deaths*, N.Y. TIMES, Mar. 11, 1999, at A7 (describing Italian response to accident involving U.S. pilots based out of Aviano).

accountable to no one." G. L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1230 (1996); *see also Gherebi*, 352 F.3d at 1300 ("[T]he United States' territorial relationship with the Base is without parallel today[.]").

Consequently, the lower court's reliance on *Eisentrager* is misplaced. *See Boumediene*, 476 F.3d at 990-92. In *Eisentrager*, this Court turned back the habeas claims of enemy aliens who were captured, tried, convicted, and detained on non-U.S. territory. Once Guantanamo is understood to be a U.S. territory for these purposes, as *Rasul* holds it must, then *Eisentrager* no longer controls. Nor can the court below draw support from the DTA provision stating that "'United States,' when used in a geographic sense . . . does not include the United States Naval Station, Guantanamo Bay, Cuba." DTA § 1005(g). Whether or not "the determination of sovereignty over an area is for the legislative and executive departments," *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948), *see Boumediene*, 476 F.3d at 992, the inquiry, per *Rasul*, into the common law scope of the writ turns not on formal sovereignty but rather on the functional level of control. Here, it is plain that the U.S. exercises such control over Guantanamo.

In short, contrary to the court of appeals decision, *Rasul*'s analytical path leads inexorably to the conclusion that the Constitution prevents Congress from eliminating the writ for the Guantanamo detainees—absent the prerequisites for suspension (rebellion or invasion), which no one asserts here. With Guantanamo under the plenary control of the United States and isolated from the heat of battle, the "ordinary constitutional processes" can, and must, move forward. *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting); *see also Rasul*, 542 U.S. at 487 (Kennedy, J., concurring) (observing that Guantanamo is "far removed from any hostilities").

III. The Framework For Challenging Detention Is an Insufficient Substitute for the Great Writ

Although the MCA deprives the Guantanamo detainees of habeas corpus, the Suspension Clause will not be offended if there remains a substitute collateral remedy that is "neither inadequate nor ineffective to test the legality of a person's detention." *Swain*, 430 U.S. at 381; *see also St. Cyr*, 533 U.S. at 314 n.38; *Sanders v. United States*, 373 U.S. 1, 14 (1963). However, no adequate substitute appears here.

This Court has upheld statutory alternatives that shifted the challenge to a different court, but did not otherwise materially alter the nature of the habeas remedy. *See Swain*, 430 U.S. at 383-84 (upholding provision shifting habeas challenges to local D.C. courts, notwithstanding the lack of tenure and salary protections); *United States v. Hayman*, 342 U.S. 205 (1952) (upholding 28 U.S.C. § 2255, which provides for actions to be brought by federal convicts in the sentencing district rather than the district of detention). These substitutes avoided constitutional difficulties largely by virtue of an escape clause allowing habeas relief any time the alternative proves "inadequate or ineffective." *Swain*, 430 U.S. at 381; *Hayman*, 342 U.S. at 223.[13] No such escape clause exists here. Rather, the procedures established under the DTA remain the sole mechanism by which detention may be challenged.

Moreover, far from a mere change in venue, the procedures available to the Guantanamo detainees for contesting deten-

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[13] Restrictions on filing successive petitions have also been approved because such constraints fall "well within the compass of [the] evolutionary process" of the writ. *Felker v. Turpin*, 518 U.S. 651, 664 (1996). Lower courts have upheld other modest limitations, such as a one-year statute of limitation—albeit often acknowledging equitable tolling as a means to avoid constitutional impropriety. *See, e.g., Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005); *Delaney v. Matesanz*, 264 F.3d 7, 12 (1st Cir. 2001); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998).

tion represent a dramatic departure from the essence of habeas relief and, accordingly, are ill-suited as an alternative. The limited status review mechanisms include CSRTs (to assess the detainees' status upon arrival) and Administrative Review Boards (ARBs) (to reassess the status annually). Congress has not spelled out the precise frame-work for the CSRTs and ARBs—except that they must "pro-vide for periodic review of any new evidence" and must, "to the extent practicable, assess" the probative value of any statements resulting from coercion, DTA § 1005(a)(3), (b)—and has, instead, entrusted the DoD to fill in the gaps, *see id.* § 1005(a)(1)(A). While a limited appeal of CSRT decisions is available to the D.C. Circuit, *see id.* § 1005(e)(2); MCA § 10, the courts are otherwise barred from hearing actions (including habeas petitions) relating to the "detention, transfer, treatment, trial, or conditions of confinement" of alien detainees alleged to be enemy combatants, *see* MCA § 7.

Whatever the precise metes and bounds of the inviolable core of habeas, the framework established by the MCA and DTA provides an insufficient substitute for habeas because it lacks three fundamental features: a hearing before an impartial adjudicator, an imperative remedy, and a fair opportunity to rebut the charges.

A. The Framework Lacks an Independent Tribunal

The MCA and DTA fail to provide an independent forum in which to contest executive detention in the first instance. Instead, detainees must face a non-neutral tribunal—a CSRT staffed with executive branch officials. *See* CSRT Rules, encl.1 § (C). Labeling the CSRT members as "*neutral* commissioned officers," *id.* (emphasis added), is of little comfort to the detainee, whose plea for release depends on the very executive branch that is detaining him. Indeed, that turns traditional habeas corpus on its head, putting the king in the role of both jailer and judge. *See Lonchar v. Thomas*, 517

U.S. 314, 322 (1996) (describing the writ's "most basic purpose" as "avoiding serious abuses of power by a government, say a king's imprisonment of an individual without referring the matter to a court"); *Boumediene*, 476 F.3d at 1005 (Rogers, J., dissenting) ("[T]hese proceedings occur before a board of military judges subject to command influence."); *cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality) (citizen entitled to "neutral decisionmaker" in challenging enemy combatant status in habeas action).

The CSRTs and ARBs are in no sense independent and, accordingly, are not a passable substitute to the great writ. Indeed, in practice, the CSRT procedures have allowed the government, upon receiving an unfavorable CSRT decision, to convene multiple tribunals until the detainee is found to be an enemy combatant. *See Boumediene*, 476 F.3d at 1006-07 (Rogers, J., dissenting).

Moreover, such a fundamental flaw cannot be remedied on review, especially given the limited scope of authority afforded the D.C. Circuit in conducting its review. *Cf. Hamdan*, 126 S. Ct. at 2807 (Kennedy, J., concurring) (expressing concern for DTA's limited review of military commissions and noting that "provisions for review of legal issues after trial cannot correct for structural defects . . . that can cast doubt on the factfinding process and the presiding judge's exercise of discretion during trial"). This deficiency alone warrants this Court's prompt intervention.

B. The Framework Lacks an Imperative Remedy

The MCA and DTA also do not provide the power to order the release of individuals whose indefinite detentions are contrary to law. At its core, the writ's function is "to afford a *swift and imperative* remedy in all cases of illegal restraint upon personal liberty." *Price v. Johnston*, 334 U.S. 266, 283 (1948) (emphasis added), *overruled on other grounds*, *McCleskey v. Zant*, 499 U.S. 467 (1991). As imported from

England, "the use of habeas corpus to *secure release* from unlawful physical confinement . . . was thus an integral part of our common-law heritage." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). This is reflected, for example, in the federal statute providing post-conviction relief for federal convicts (as a substitute to habeas under § 2241): if the sentence is illegal, the court is authorized to "discharge the prisoner" after "vacat[ing] and set[ting] the judgment aside." 28 U.S.C. §.2255. While the writ may, over time, have expanded, a claim for "immediate release . . . lies at 'the core of habeas corpus.'" *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005).

1. A CSRT has no power to order a detainee released, even if it determines that the detainee is not an enemy combatant. As implemented, if the CSRT "determines that the detainee shall no longer be classified as an enemy combatant," its decision (after approved by the Director) is forwarded "in order to *permit* the Secretary of State to coordinate the transfer of the detainee with representatives of the detainee's country of nationality for release *or other disposition* consistent with applicable laws," CSRT Rules, encl.1 § (I)(9) (emphasis added), and "consistent with domestic and international obligations and the foreign policy of the United States," CSRT Order § (i). Also, the "implementing directive is subject to revision at any time." CSRT Rules at 2. The lack of a remedy is apparent from this permissive language.

2. In similar fashion, an ARB offers little remedial hope. An ARB, which convenes annually to reassess detainee status, is directed to "conduct its own proceeding and make an independent recommendation notwithstanding any prior determinations" and, thereafter, "make a recommendation" to the Designated Civilian Officer (DCO) to release, transfer, or continue to detain. Memorandum for Secretaries of the Military Departments, Revised Implementation of Administrative Review Procedures, encl.3 § 1(b) (July 14, 2006). The

DCO "decides whether to release, transfer with conditions, or continue to detain the enemy combatant" and coordinates with various cabinet departments "to implement any enemy combatant release or transfer according to established Deputy Secretary of Defense policy." *Id.*, encl.4 § 5(c)-(d).

The non-mandatory language of the rules establishing both the CSRTs and ARBs, in the absence of statutory constraints, provides ample wiggle room for continued detention at the discretion of the executive officials—who are under no obligation to reach an agreement with the host countries at all, let alone in an expeditious fashion. By claiming it has not received adequate assurances from the home countries to address security risks posed by the individuals to be released, the executive branch can refrain indefinitely from actually releasing the detainees.[14] In short, neither the CSRTs nor the ARBs have the authority to require the executive to release any detainees, even ones designated for release or found no longer to be enemy combatants.

3. Nor is the D.C. Circuit given authority to order release. Even if that court, in exercising its limited review, concludes that the CSRT's procedures were improper—that is, the court determines either that the CSRT did not comply with the Defense Secretary's "standards and procedures" or that the "standards and procedures" are inconsistent with the Constitution and laws of the United States—the court is only given authority "to determine the validity of any final decision of a [CSRT]." DTA § 1005(e)(2)(A), (C). Voiding the CSRT's decision would thus apparently leave the detainee in his *ex ante* position—*i.e.*, detained.

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[14] *See* Dep't of Defense, Transcript of Press Conference (Mar. 6, 2007) (discussing 80 detainees still in custody despite being "designated for release or transfer"), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902 (last visited Mar. 12, 2007).

In sum, lacking an imperative remedy, these procedures cannot be an adequate substitute for the great writ. As has been the case over the last five years, such "indefinite detention of an alien" represents a "serious constitutional problem," *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), impacting "friends and foes alike." *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring).

C. The Framework Fails to Afford a Fair Opportunity to Rebut the Accusations

In light of the *Rasul* Court's characterization of Guantanamo as being under plenary U.S. control—which perhaps makes it akin to the "unincorporated territories" in the *Insular Cases*—the detainees are entitled to at least a bare minimum of due process in contesting enemy combatant status.[15] However, the framework established by the MCA and DTA falls short and, accordingly, is an inadequate substitute for habeas corpus.

In *Hamdi v. Rumsfeld*, a plurality of this Court determined that, upon seeking habeas relief, a citizen captured in a foreign country and detained within the United States as an enemy combatant must be given notice of the factual basis underlying his classification, a fair opportunity to rebut the

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[15] *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922) (constitution affords "certain fundamental personal rights" to inhabitants of territories not yet "incorporated" by Congress); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1342-43 (2d Cir. 1992) ("fundamental constitutional rights" are guaranteed to Guantanamo inhabitants), *vacated as moot*, 509 U.S. 918 (1993); *Gov't of the Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974) (treating Canal Zone as unincorporated U.S. territory); 35 Op. Att'y Gen. 536, 540 (1929) (Canal Zone grant "appear[s] to be no less comprehensive a grant that the lease from Cuba"); Neuman, *supra*, at 1200 (comparing Guantanamo to Canal Zone); *but see Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995); *cf. Vermilya-Brown*, 335 U.S. at 405 (Jackson, J., dissenting) (arguing Guantanamo is not a "possession").

government's assertions before a neutral decisionmaker, and the assistance of counsel. 542 U.S. at 533, 539. As the plurality explained, the Due Process Clause "informs the procedural contours" of the writ of habeas corpus. 542 U.S. at 525; *see also* D. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 75 n.67 (2006) ("[T]he habeas remedy (or an adequate alternative) and the right of a detainee not to be deprived of liberty without due process are intertwined.").

While this does not necessarily indicate that the same level of constitutional protection must attach to detainees held at Guantanamo,[16] at least some minimal fundamental due process protections must apply to the detainees in light of the indefinite nature of the detention on territory over which the United States exercises complete jurisdiction and control. *See Rasul*, 542 U.S. at 487 (Kennedy, J., concurring) (Guantanamo is under the "implied protection" of the United States); *Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."); *Verdugo-Urquidez*, 494 U.S. 259, 271-72 (1990) (reserving the question whether a "lawful but involuntary" presence, if prolonged, would constitute "substantial connections with this country" such that constitutional protections attach).

These are not "some undefined, limitless class of noncitizens who are beyond our territory." *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring). These are 385 individuals who "face continued detention, perhaps for life," and, even though aliens are "subject to limitations and conditions not applicable to citizens," they are nonetheless entitled to a "fair hearing under lawful and proper procedures." *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting);

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[16] *Cf. Dorr v. United States*, 195 U.S. 138 (1904) (no Sixth Amendment right to jury trial in Philippines, which was then an insular possession).

see also Hamdi, 542 U.S. at 530 ("[A]n unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present [an immediate] threat [to the national security of the United States during ongoing international conflict].").

The framework prescribed by statute and implemented in the CSRTs does not guarantee a detainee sufficient opportunity to contest his status as an enemy combatant. First, the detainee "shall not be represented by legal counsel," and will only have access to a "Personal Representative"—who is a commissioned officer appointed by the Director, and with whom "no confidential relationship exists." CSRT Rules, encl.1 § (F)(5); *id.*, encl.3 §§ (A)(1), (C)(1). Access to legal counsel has long been held to be an essential aspect of challenging one's detention. Second, the evidentiary standards raise serious concerns due to the potential use of information obtained under abusive interrogation techniques; the limitation on discovery of classified information; the admission of hearsay evidence; the tribunal's discretion to screen out evidence found to be not "reasonably available"; the government's low burden of proof; and the rebuttable presumption in favor of the government's evidence. *See* DTA § 1005(b)(1), (e)(2)(C)(i); CSRT Rules, encl.1 §§ (B), (E)(2)-(3), (F)(6), (F)(8), (G)(2), (G)(7), (G)(9)-(11), (H)(7). While some of these elements might be individually justifiable depending on the circumstances, *see Hamdi*, 542 U.S. at 533-34 (giving qualified approval of hearsay evidence and rebuttable presumptions) (plurality), in the aggregate, this framework denies a detainee a "fair opportunity to rebut the Government's factual assertions" and "present his own factual case to rebut the Government's return," *id.* at 533, 538; *see also Boumediene*, 476 F.3d at 1004-06 (Rogers, J., dissenting).

One particular anecdote, recounted in an opinion rendered by the United States District Court for the District of Colum-

bia below, brings the matter into focus. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). An individual was being detained on allegations that he was "associated with a known Al Qaida operative." *Id.* at 469. However, he was not told his purported associate's name (the tribunal did not even know it) and was unable to view the evidence against him (if there even was any). Unable to defend himself, he simply denied the charges and stated: "I was hoping you had evidence that you can give me. . . . [I]f a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that." *Id.* The resulting laugher by those in the tribunal room demonstrates the absurdity of the situation. As the district court judge noted, it would have been humorous, had it not been so serious and "had the detainee's criticism of the process not been so piercingly accurate." *Id.* at 470. This is hardly an adequate substitute for habeas corpus.

Congress is, of course, capable of amending the statute not just to *recognize* the CSRTs and ARBs, *see* DTA § 1005(a)(1)(A), but to further prescribe a framework commensurate with traditional habeas review. By making clear that certain constitutional minimums apply, this Court will preserve Congress's role in mapping out the way forward while simultaneously allowing the detainees the opportunity to be heard and to advance the merits of their individual cases.

IV. This Court's Guidance is Necessary as a Bulwark of Liberty

Within Congress, there has been extensive debate over the last few years regarding the Guantanamo detainees' access to habeas corpus. Some Members have argued that the provisions in the MCA (and, before that, the DTA) stripping the courts of habeas jurisdiction, MCA § 7; DTA § 1005(e), pass

constitutional muster.[17] Others have taken the contrary position.[18] Moreover, some lawmakers have explicitly sought to amend or delete the offending MCA habeas provisions.[19] In the last Congress, the Senate Judiciary Committee held three hearings, chaired by *amicus*, examining the detainees' situation and considering testimony from a wide array of legal authorities.[20]

While this exchange of ideas is surely healthy and appropriate, the conversation has begun to generate diminishing returns. Meanwhile, the detainees wait, and uncertainty surrounds a fundamental constitutional principle. If the Court declines to resolve these important issues in this term, the detainees could face more than another full year in legal limbo. Although Congress will continue to discharge its

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[17] *See, e.g.*, 152 CONG. REC. S10359 (Sept. 28, 2006) (Sen. Sessions); *id.* at S10265-67 (Sept. 27, 2006) (Sens. Graham and Warner); *id.* S10267-72 (Sen. Kyl); *id.* at S10272-73 (Sen. Cornyn).

[18] *See, e.g.*, 153 CONG. REC. S2962-63 (Mar. 9, 2007) (Sen. Leahy); *id.* at S2749-51 (Mar. 7, 2007) (Sen. Specter); 152 CONG. REC. S10366 (Sept. 28, 2006) (Sen. Dodd); *id.* at S10264-65 (Sept. 27, 2006) (Sen. Specter); *id.* at S10243 (Sen. Levin); *id.* at S10361 (Sen. Feingold); *id.* at S10400 (Sen. Kennedy); *id.* at S10409 (Sen. Biden); *id.* at H7548, H7550, H7559 (Reps. Conyers, Lofgren, Nadler, and Jackson-Lee); 151 CONG. REC. S14309 (Nov. 10, 2005) (Sen. Bingaman); *id.* at H11866 (Dec. 15, 2005) (Rep. Kucinich).

[19] *See, e.g.*, Habeas Corpus Restoration Act of 2007, S. 185, 110th Cong.; Habeas Corpus Restoration Act of 2006, S. 4081, 109th Cong.; Effective Terrorists Prosecution Act of 2006, S. 4060, 109th Cong.; S.A. 5087, 109th Cong. (2006).

[20] *See Examining Proposals to Limit Guantanamo Detainees' Access to Habeas Corpus Review: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (Sept. 25, 2006); *Hamden v. Rumsfeld: Establishing a Constitutional Process: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (July 11, 2006); *Detainees: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (June 15, 2005).

duties, at the end of the day, it falls to this Court to say, emphatically, what the law is.

In an address at Buffalo Law School in 1951, Justice Jackson warned that "suspension of privilege of the writ of habeas corpus is in effect a suspension of every other liberty." Robert Jackson, *Wartime Security and Liberty Under Law,* 1 BUFFALO L. REV. 103, 109 (1951). To avoid an incongruous legal "black hole" at Guantanamo, the Court should review one or both of these cases, strike down the MCA's illegal suspension of the great writ, and pave the way for Congress to address this challenging situation consistent with the constitutional reach of the writ.

CONCLUSION

This Court should grant the petitions for a writ of *certiorari* and move expeditiously to decide the cases this term.

Respectfully submitted,

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No. 06--1196

In the Supreme Court of the United States

KHALED A. F. AL ODAH, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING FROM DENIAL OF CERTIORARI

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Petitioners, foreign nationals held in the custody of the United States at Guantanamo Bay Naval Station, Cuba, petition under Rule 44.2 for rehearing of the Court's Order of April 2, 2007, denying their petition for a writ of certiorari. The grounds for this petition are those set forth in the petition for rehearing filed today by petitioners in *Boumediene v. Bush*, No. 06-1195, and petitioners incorporate by reference and rely upon those grounds in this petition. A certification of counsel that this petition is presented in good faith and not for delay, and that the grounds for this petition are intervening circumstances of a substantial and controlling effect and other substantial grounds not previously presented, is annexed.

CONCLUSION

The Court should grant this Petition for Rehearing from Denial of Certiorari.

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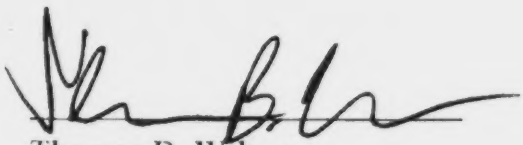
CERTIFICATION OF COUNSEL (RULE 44)

I certify that the Petition for Rehearing from Denial of Certiorari is presented in good faith and not for delay and is restricted to the grounds specified in Supreme Court Rule 44.2.

Dated: April 27, 2007



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